(19)

No. 01-1368-CFX Title: Nevada Department of Human Resources, et al., Petitioners
v.
William Hibbs, et al.

Docketed:
March 19, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Mar 11 2002	Petition for writ of certiorari filed. (Response due May 20, 2002)
	Apr 10 2002	Order extending time to file response to petition until May 20, 2002.
	Apr 10 2002	This extension is granted for all respondents.
	May 20 2002	Brief of respondent United States in opposition filed.
	May 20 2002	LODGING consisting of ten copies of letters received from the Solicitor General.
	May 20 2002	Brief of respondent William Hibbs in opposition filed.
	May 20 2002	Motion of respondent William Hibbs for leave to proceed in forma pauperis filed.
	May 20 2002	Brief amicus curiae of Alabama, et al. filed.
	May 31 2002	Reply brief of petitioners Nevada Department of Human Resources, et al. filed.
	Jun 4 2002	DISTRIBUTED for Conference of June 20, 2002
	Jun 24 2002	Motion of respondent William Hibbs for leave to proceed in forma pauperis GRANTED.
	Jun 24 2002	Petition GRANTED. SET FOR ARGUMENT January 15, 2003. **********
	Jul 22 2002	Order extending time to file the joint appendix and petitioners' brief on the merits to and including August 22, 2002.
	Aug 21 2002	Brief amicus curiae of Pacific Legal Foundation filed.
	Aug 22 2002	Joint appendix filed.
	Aug 22 2002	Brief of petitioners Nevada Department of Human Resources, et al. filed.
	Aug 22 2002	Brief amici curiae of Alabama, et al. filed.
	Aug 23 2002	Motion of Coalition for Local Sovereignty for leave to file a brief as amicus curiae filed.
	Sep 17 2002	Order extending time to file respondents' briefs on the merits to and including October 25, 2002.
	Oct 7 2002	Motion of Coalition for Local Sovereignty for leave to file a brief as amicus curiae GRANTED.
	Oct 25 2002	Brief of respondent William Hibbs filed.
	Oct 25 2002	LODGING consisting of related material received from counsel for the respondent
	Oct 25 2002	Brief of respondent United States filed.
	Oct 25 2002	Brief amici curiae of Lawyers',Committee for Civil Rights Under Law, et al. filed.
	Oct 25 2002	Brief amicus curiae of American Federation of Labor and Congress of Industrial Org. filed.
	Oct 25 2002	Brief amici curiae of National Women's Law Center et al. filed.
	Oct 25 2002	Brief amici curiae of New York, et al. filed.

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No. 01-1368-CFX

Entry	Date	Proceedings and Orders
	Oct 25 2002	Brief amici curiae of Christopher Dodd, et al. filed.
	Oct 25 2002	Brief amici curiae of Women's History Scholars Alice Kessler-Harris, et al. filed.
	Nov 5 2002	Motion of the Solicitor General for divided argument filed.
	Nov 12 2002	Motion of petitioner NV Dept. of Human Resources, et al. and State of Alabama for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Nov 21 2002	CIRCULATED.
	Nov 25 2002	Reply brief of petitioners NV Dept. of Human Resources, et al. filed.
	Nov 29 2002	Record filed.
	Dec 6 2002	Record filed.
	Dec 16 2002	Motion of the Solicitor General for divided argument GRANTED.
	Dec 16 2002	Motion of petitioner NV Dept. of Human Resources, et al. and State of Alabama for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
	Jan 14 2003	Letter from counsel for the respondent received and distributed.
	Jan 15 2003	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 01–

IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

v.

WILLIAM HIBBS

Respondent,

and

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 29 U.S.C. § 2612(a)(1)(C) exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioners are (1) the Nevada Department of Human Resources, (2) the Director of the Nevada Department of Human Resources, Charlotte Crawford, and (3) Nikki Firpo, a supervisor in the Nevada Department of Human Resources, Welfare Division. The Respondents are William Hibbs and the United States of America, which intervened below to defend the constitutionality of 29 U.S.C. § 2612(a)(1)(C).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–46a) is reported at 273 F.3d 844, and the district court's opinion (Pet. App. 48a–58a) is unreported.

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331. The court of appeals asserted jurisdiction pursuant to 28 U.S.C. § 1291, and entered judgment on December 11, 2001. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The relevant provisions of the Fourteenth Amendment to the United States Constitution provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ***
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The pertinent provision of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1), is as follows:

> (1) Entitlement to leave
>
> Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> > (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
> >
> > (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
> >
> > (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
> >
> > (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Additional provisions of the FMLA that may aid the Court are set forth in an appendix to this petition. Pet. App. 61a–65a.

STATEMENT

This case squarely presents a recurring constitutional question that is dividing the lower courts and has not been—but should be—resolved by this Court: whether § 2612(a)(1)(C) of the FMLA is a valid exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment that abrogates state sovereign immunity.

1. Under Section 1 of the Fourteenth Amendment, States are prohibited from intentionally discriminating on the basis of gender unless such discrimination is substantially related to the achievement of an important governmental interest. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). Under Section 5 of the Amendment, Congress is permitted to

enact "appropriate" legislation to "enforce" Section 1, but there must be "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

2. In enacting the FMLA, Congress purported to be "minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . on a gender-neutral basis." 29 U.S.C. § 2601(b)(4), Pet. App. 62a. To that end, it required all employers to provide every employee twelve weeks of leave (A) "[b]ecause of the birth of a son or daughter . . . . (B) [b]ecause of the placement of a son or daughter with the employee for adoption or foster care[;] (C) [i]n order to care for the spouse, or a son, daughter, or parent, of the employee . . . . [or] (D) [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1).

3. This case concerns the FMLA's third leave provision, § 2612(a)(1)(C), which allows employees to take 12 weeks of leave to care for sick family members. It arises from the termination of Respondent, William Hibbs, from his employment at the Nevada Department of Human Resources, Welfare Division, after taking excessive and unauthorized leave.

Beginning in April 1997, Hibbs initiated a series of requests for leave under § 2612(a)(1)(C) to care for his ailing wife. At that time he asked for and received approval to take 480 hours (12 weeks) of leave pursuant to the Act. Pet. App. 2a. In June 1997, Hibbs requested an additional 379.8 hours of "catastrophic leave," leave donated by other employees. *Id.* He was initially granted only 200 hours of this leave, but in September was granted an additional 180 hours. *Id.*

In October 1997, well after Hibbs had exhausted his twelve-week leave under the FMLA, Nevada informed Hibbs that he could not take any additional time off under the Act. *Id.* Hibbs did not return to work, however, and on November 6, 1997, the State informed Hibbs by a hand-delivered letter that it would not approve further leave time and that he was required to return to work or face disciplinary action. *Id.* 2a–3a. Hibbs failed to return to work, failed to notify the Welfare Division that he would not be returning, and failed to explain his absence. Pet. App. 3a.

On December 8, 1997, Nevada served Hibbs with a written statement that described disciplinary charges pending against him and set a pre-disciplinary hearing for later that month. *Id.* At the hearing, Hibbs argued that Nevada was misapplying the FMLA and asserted that he had additional family-care leave remaining, but the hearing officer disagreed and recommended Hibbs' dismissal. *Id.* On December 22, 1997, pursuant to this recommendation, Hibbs was terminated from his position with the Nevada Department of Human Resources, Welfare Division. *Id.* Hibbs subsequently filed a grievance with the Welfare Division, but the grievance process was no longer available to him in light of his termination. *Id.* Accordingly, the Welfare Division construed the grievance as an appeal of the termination decision and forwarded it to the State Personnel Department, which rejected the "appeal" as untimely. *Id.*

4. Hibbs then sued the Nevada Department of Human Resources, its director, and his supervisor (collectively "Nevada") in the United States District Court for the District of Nevada, claiming, as is relevant here, that the State violated the FMLA by failing to approve his request for leave to care for his wife. Pet. App. 3a–4a. On June 3, 1999, the district court entered judgment in favor of Nevada on the ground that Hibbs' FMLA claim was barred by the Eleventh Amendment to the United States Constitution. *Id.* 59a–60a. The district court explained that in order to abrogate state sovereign

immunity the FMLA would have to be, but was not, appropriate remedial legislation under Section 5 of the Fourteenth Amendment. *Id.* 52a–56a.

5. On December 11, 2001, the United States Court of Appeals for the Ninth Circuit, in an opinion authored by Judge Tashima and joined by Judges Reinhardt and Berzon, reversed. The court observed initially that "[s]even other circuits have held that the FMLA was not enacted pursuant to a valid exercise of Congress'[s] [S]ection 5 power." *Id.* 5a. It distinguished six of these decisions, however, on the ground that they did not consider the particular provision of the FMLA at issue here, § 2612(a)(1)(C), but rather reviewed § 2612(a)(1)(D), which requires employers to grant leave so that employees may tend to their own illnesses. *See* Pet. App. 5a–6a. In the court's view this difference mattered "because § 2612(a)(1)(C) can more plausibly be defended as an attempt to remedy gender discrimination." *Id.* 6a. With respect to the seventh case, *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000), the court acknowledged that it addressed "the FMLA provision at issue in Hibbs' case, namely § 2612(a)(1)(C)" (Pet. App. 5a), but found "*Kazmier*'s analysis unpersuasive" and "decline[d] to follow it." Pet. App. 19a.

Turning to this Court's precedent, the Ninth Circuit stated that the Court has traditionally required "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," for federal legislation to fall within the scope of Congress's Section 5 remedial authority. *Id.* 10a (internal quotations and citation omitted). Again, however, the Ninth Circuit distinguished this precedent, in particular *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), on the ground that the Court's cases "dealt with federal statutes that prohibit discrimination on the basis of age and disability" and "depended heavily upon the fact that age and disability

classifications are not subject to heightened scrutiny under the Equal Protection Clause." Pet. App. 11a. Accordingly, in the Ninth Circuit's view, the "recent Supreme Court cases" developing and applying Section 5 "offer[ed] limited guidance." *Id.*

After concluding that this Court's Section 5 jurisprudence was uninformative, the Ninth Circuit held that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, [S]ection 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional. That is, the burden is on the challenger of the legislation to prove that [S]tates have *not* engaged in a pattern of unconstitutional conduct." *Id.* 18a (emphasis in original). Here, because Nevada had "failed to show that there is *not* a widespread pattern of gender discrimination by [S]tates regarding the granting of leave to employees to care for sick family members or a historical record of state enforcement of stereotypical family roles," the court had to conclude that § 2612(a)(1)(C) was appropriate and remedial under Section 5. *Id.* 19a (emphasis added).

In the alternative, the Ninth Circuit reasoned that the legislative history of the FMLA "contains substantial evidence of gender discrimination with respect to the granting of leave to state employees." *Id.* 20a. As its only example of this "substantial evidence," the Ninth Circuit pointed to a study demonstrating that private employers tend to provide inadequate paternity leave and further observed that a different study submitted to a congressional subcommittee suggested that state paternity leave policies were similar to the private sector's policies. *Id.* 20a–21a. Although it recognized that these studies said nothing about the leave States grant employees to tend to sick family members, the Ninth Circuit concluded that it had wide "latitude in drawing inferences from the legislative history of a federal statute aimed at remedying state-sponsored gender discrimination." Pet. App. 22a. In light of this latitude, the studies, taken together,

were "strong circumstantial evidence of state-sponsored gender discrimination in the granting of leave to care for a sick family member, because if [S]tates discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other." *Id.* 21a.

Finally, the Ninth Circuit identified a third rationale for upholding § 2612(a)(1)(C): according to the court, it sought to remedy the historical role States played in perpetuating the stereotype that women are family caregivers. According to the Ninth Circuit, every State prior to 1969 had "some form of labor legislation 'protective' of women only," such as laws limiting the hours women could work and prescribing their wages. Pet. App. 25a. These laws, the court of appeals reasoned, were based on and perpetuated "stereotypical beliefs about the appropriate roles of men and women." *Id.* 29a. Section 2612(a)(1)(C), the Ninth Circuit concluded, "by providing for family-care leave on a *gender neutral* basis, . . . counteracted any tendency by employers either to refuse to hire women because of their presumed higher need for family-care leave, or to afford such leave to women but not to men, thus reinforcing gender roles." *Id.* 36a (emphasis in original) (internal quotations and citation omitted).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit concluded that § 2612(a)(1)(C) is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment based on three alternative rationales: (i) § 2612(a)(1)(C) is an appropriate remedy under Section 5 because States are *presumed* to unconstitutionally discriminate on the basis of gender, and the State of Nevada had failed to overcome this presumption (Pet. App. 12a–19a); (ii) even though the legislative history of the FMLA contains no evidence that Congress intended to remedy unconstitutional discriminatory practices in the granting of *family-care* leave, the history contained scant evidence about state *paternity* leave policies from which the court could *infer* a remedial

purpose (*id.* 20a–22a); and (iii) § 2612(a)(1)(C) is a response to the States' pre-1969 laws that were based on the stereotype that women are family caregivers (*id.* 23a–42a).

The result reached by the Ninth Circuit, that § 2612(a)(1)(C) is a valid exercise of Congress's authority under Section 5, and its reasons for decision conflict with the decisions of eight other circuit courts and one state court of last resort. In addition, this case raises important federal questions, namely the scope of Congress's authority under Section 5 and state sovereign immunity, that are recurring in nature. The Ninth Circuit's decision, moreover, is erroneous and contrary to the well-established precedent of this Court. Accordingly, every factor that the Court usually considers when deciding whether to grant a writ of certiorari applies here, and each demonstrates that the Ninth Circuit's decision plainly warrants review, if not summary reversal.

I. THE COURT SHOULD RESOLVE A LOWER-COURT SPLIT OVER WHETHER § 2612(a)(1)(C) IS APPROPRIATE ENFORCEMENT LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

As acknowledged by the court of appeals (Pet. App. 5a–6a), the lower courts are divided over whether the FMLA is a valid exercise of Congress's Section 5 power. On the particular question whether § 2612(a)(1)(C) is appropriate remedial legislation, the Ninth Circuit's decision directly conflicts with decisions of the Fifth and Sixth Circuits. Moreover, on the question of how courts generally should test whether legislation purporting to remedy gender discrimination is appropriate under Section 5, the Ninth Circuit's decision further conflicts with decisions of the First, Second, Third, Fourth, Eighth, and Eleventh Circuits, as well as the Kansas Supreme Court.

As the Ninth Circuit candidly acknowledged (Pet. App. 19a), the decision below squarely conflicts with the Fifth

Circuit's decision in *Kazmier v. Widmann*, 225 F.3d 519 (2000). In *Kazmier*, the Fifth Circuit, like the Ninth Circuit, reviewed § 2612(a)(1)(C), but unlike the Ninth Circuit, it concluded that the provision was congressional overreaching that attempted to change the substance of the Equal Protection Clause rather than remedy a state constitutional violation.

In doing so, the Fifth Circuit applied a two-step test based on this Court's decision in *Kimel*: "At the first step, we begin our analysis by determining what type of constitutional violation the statute under review is designed to prevent . . . . [A]t *Kimel*'s second step, [we examine] the legislative record of the statute under review to see whether it contains evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statutes' provisions." 225 F.3d at 524 (emphasis in original). Applying this test, the Fifth Circuit observed initially that "[t]he mere invocation by Congress of the specter of sex discrimination . . . is insufficient to support the validity of legislation under Section 5." *Id.* at 526. In addition, the court held that no evidence supported the assertion that § 2612(a)(1)(C) remedies unconstitutional state conduct because "the legislative record for this provision is devoid of evidence of public sector discrimination." *Id.* In the Fifth Circuit's view, this lack of evidence, combined with the "broad swath" of constitutional conduct the section prohibits, meant that § 2612(a)(1)(C) is not appropriate remedial legislation. *Id.*

The Sixth Circuit in *Thomson v. Ohio State University Hospital*, 238 F.3d 424, 2000 WL 1721038 (6th Cir. 2000), likewise held that § 2612(a)(1)(C) is not a valid exercise of Congress's Section 5 authority but is "overbroad." *Id.* at *2. In reaching this decision, the Sixth Circuit relied exclusively on its earlier decision in *Sims v. University of Cincinnati*, 219 F.3d 559 (6th Cir. 2000). There, the court reasoned that the FMLA was "a piece of social legislation rather than a remedy for ongoing state violations of the Equal Protection Clause," *id.* at 564, because it "creates an affirmative obligation on the

part of the States to provide twelve weeks of leave. . . . [an obligation that] far outstrip[s] the requirements of the Fourteenth Amendment." *Id.* at 565. "In light of the broad scope of its substantive requirements, and the lack of evidence of widespread and unconstitutional gender discrimination by the States," the court concluded that the "FMLA is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment." *Id.* at 566.

In addition to departing from a majority of courts on the question whether § 2612(a)(1)(C) is appropriate remedial legislation under Section 5, the Ninth Circuit adopted a test to determine the section's validity that is flatly inconsistent with the standards applied by six other federal courts of appeal, the First, Second, Third, Fourth, Eighth, and Eleventh Circuits, and one state court of last resort, the Kansas Supreme Court, all of which have considered whether some provision of the FMLA that purports to remedy gender discrimination is appropriate remedial legislation under Section 5. *See Laro v. New Hampshire*, 259 F.3d 1, 13 (1st Cir. 2001); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000); *Montgomery v. Maryland*, 266 F.3d 334, 339-40 (4th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3475 (U.S. Jan. 18, 2002) (No. 01-1079) (raising only questions of waiver); *Lizzi v. Alexander*, 255 F.3d 128, 134-36 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094, 1095 (8th Cir. 2000); *Garrett v. Univ. of Ala. at Birmingham Bd. of Tr.*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001); *Schall v. Wichita State Univ.*, 7 P.3d 1144, 1160-62 (Kan. 2000). This judicial conflict over the proper standard to apply in determining whether legislation that concerns gender-based classifications is valid under Section 5 reinforces the need for review by this Court.

In *Hale v. Mann*, for example, the Second Circuit considered whether the leave provisions of the FMLA are a valid exercise of Congress's Section 5 authority and, like the

Ninth Circuit, agreed that the FMLA purports to remedy gender discrimination. But, unlike the Ninth Circuit, the court declined to accept the assertion that the FMLA is aimed at remedying unconstitutional state conduct because Congress "fail[ed] to specifically find that women are disproportionately affected by" conditions requiring leave. It ultimately concluded that the "grant of leave is overbroad." *Hale*, 219 F.3d at 68-69.

The Third Circuit likewise held in *Chittister v. Department of Community & Economic Development*, 226 F.3d at 228-29, that the FMLA is not appropriate remedial legislation. The circuit court framed the question before it as whether Congress had made "any finding concerning the existence" of leave practices "that amounted to intentional gender discrimination in violation of the Equal Protection Clause." *Id.* It noted that there is no "substantial evidence of such violations in the legislative record" and concluded that the FMLA's mandatory leave requirement could not be said "to be congruent or proportional to any identified constitutional harm, and it cannot be said to be tailored to preventing any such harm." *Id.* at 229.

The Fourth Circuit's analysis of the FMLA in *Lizzi v. Alexander* is nearly identical. There, the court refused to credit the FMLA as a remedy to unconstitutional gender discrimination because "Congress did not identify, as it is required to do, *any* pattern of gender discrimination by the [S]tates with respect to the granting of employment leave for the purpose of providing family or medical care." *Lizzi*, 255 F.3d at 135 (emphasis added). It concluded that with § 2612(a)(1)(D) "[i]nstead of attempting to remedy the identified [constitutional] violation, Congress attempted to redefine the right." *Id.*

The decisions of the First, Eighth and Eleventh Circuits, and the Kansas Supreme Court are no different in their reasoning and analysis. *See Laro*, 259 F.3d at 13 ("[W]here

the connection between the provision at issue and gender-based discrimination is indirect at best, it is incumbent on Congress either to establish a clear link to the prevention of unconstitutional gender discrimination or to identify problematic state practices to which the provision responds."); *Townsel*, 233 F.3d at 1096 ("The key point is that the FMLA makes illegal a great deal of conduct not even arguably prohibited by the Fourteenth Amendment, and provides for remedies a great deal more extensive than the Fourteenth Amendment could even arguably require."); *Garrett*, 193 F.3d at 1220 ("This type of anecdotal legislative history [as is found in the FMLA] is insufficient to indicate Congress had identified particular unconstitutional actions by the [S]tates involving serious health conditions irrespective of gender or family situations."); *Schall*, 7 P.3d at 1161 ("The FMLA does not merely make it illegal for employers to treat requests for leave differently on the basis of gender but instead mandates that employers provide employees with a new and valuable benefit.").

The decision below plainly conflicts with these FMLA cases. Like the Ninth Circuit, these courts considered provisions of the FMLA that purported to remedy gender discrimination in the workplace. But unlike the Ninth Circuit, no other court abandoned the requirement that Congress remedy "*actual constitutional violations by the States*" simply because Congress's findings mentioned the "specter of sex discrimination." *Kazmier*, 225 F.3d at 524, 526 (emphasis in original). They all applied this Court's Section 5 precedent and thoroughly examined the FMLA's legislative history for some evidence that Congress intended to remedy actual, existing unconstitutional state conduct. Finding none, each court held that the FMLA did not pass constitutional muster.

The Ninth Circuit nonetheless attempted to disclaim any division of authority except as between its decision and the Fifth Circuit's in *Kazmier* because, in its view, only *Kazmier* specifically discussed § 2612(a)(1)(C). Pet. App. 5a. Even if

the Ninth Circuit were correct, which it is not, the split of authority between it and the Fifth Circuit, when combined with the importance of the question presented and the Ninth Circuit's disregard for binding Supreme Court precedent, would be sufficient to support granting this writ. But the Ninth Circuit's attempt to insulate its decision is wrong.

The lower court failed to appreciate the decisions of the Sixth Circuit. That court *has* reviewed § 2612(a)(1)(C), and in *Thomson* held that the provision is not a valid exercise of Congress's Section 5 authority. In addition, because the Ninth Circuit did not issue a narrow decision concerning just § 2612(a)(1)(C) but, by its own admission, was attempting to determine generally "how legislation that is meant to prevent gender discrimination, but that sweeps substantially more broadly than the Equal Protection Clause, should be analyzed under [S]ection 5" (Pet. App. 12a), its decision must be judged against the tests employed by the other circuit courts in this larger context. In this respect, the Ninth Circuit's analysis also conflicts with the analysis adopted by the First, Second, Third, Fourth, Eighth and Tenth Circuits, and the Kansas Supreme Court in cases considering other FMLA provisions that purport to remedy gender discrimination.

II. THIS RECURRING FEDERAL QUESTION IS EXCEEDINGLY IMPORTANT.

Besides raising an issue that implicates a split of authority, the petition addresses a significant constitutional question that is of essential importance to every State and is frequently recurring, a fact that, by itself, supports this Court's review. The question here concerns Congress's authority to enact legislation under Section 5 of the Fourteenth Amendment and ultimately the sovereign immunity of States, both of which are issues this Court has recognized are sufficiently important to merit its review. *See Alden v. Maine*, 527 U.S. 706, 712 (1999) (granting certiorari to resolve a split between the Maine and Arkansas Supreme Courts concerning the "importan[t]"

question of state sovereign immunity); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976) (granting certiorari absent a split of authority where the question presented concerned the "important constitutional question" of Congress's authority under Section 5). The sheer number of cases considering the validity of the FMLA as applied to States, moreover, confirms that the question whether it is appropriate enforcement legislation is frequently recurring in nature. In addition to the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, and the Kansas Supreme Court, numerous district courts have been asked to consider the constitutionality of the FMLA's leave provisions: *Williamson v. Ga. Dep't of Human Res.*, 150 F. Supp. 2d 1375 (S.D. Ga. 2001); *Philbrick v. Univ. of Conn.*, 90 F. Supp. 2d 195 (D. Conn. 2000); *Cohen v. Neb. Dep't of Admin. Servs.*, 83 F. Supp. 2d 1042 (D. Neb. 2000); *Darby v. Hinds County Dep't of Human Servs.*, 83 F. Supp. 2d 754 (S. D. Miss. 1999); *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403 (M.D. Pa. 1999); *Post v. Kansas*, No. 98-1238-JTM, 1998 WL 928677 (D. Kan. Dec. 10, 1998); *Driesse v. Fla. Bd. of Regents*, 26 F. Supp. 2d 1328 (M.D. Fla. 1998); *McGregor v. Goord*, 18 F. Supp. 2d 204 (N.D.N.Y. 1998); *Serafin v. Conn. Dep't of Mental Health & Addiction Servs.*, 118 F. Supp. 2d 274 (D. Conn. 2000); *Biddlecome v. Univ. of Tex.*, No. 96-1872, 1997 WL 124220 (S.D. Tex. Mar. 13, 1997); *Jolliffe v. Mitchell*, 986 F. Supp. 339 (W.D. Va. 1997); *Knussman v. Maryland*, 935 F. Supp. 659 (D. Md. 1996).

Aside from the importance of the legal question involved, the issue is significant to the States within the Ninth Circuit on a practical level as well. These States, which include Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, have *thousands* and *thousands* of employees who (under the Ninth Circuit's decision) may instigate litigation for money damages in federal court against their state employer to resolve disputes about excessive leave. Such a flood of litigation would both undercut the careful

balance between federal and state power established by the Constitution and unnecessarily drain these States' fisc. In addition, the uncertainty created by the Ninth Circuit's opinion is a hindrance to these States' hiring and firing practices. In light of the decision below, the States within the Ninth Circuit are no longer free to fire chronically-absent employees, or hire others to replace the absent employees, for fear that they will be required to defend their decisions in protracted federal court litigation. In light of the substantial practical costs the Ninth Circuit's decision imposes on these States, the Court should not delay in resolving the question presented.

III. THE NINTH CIRCUIT ERRED IN CONCLUDING THAT § 2612(a)(1)(C) IS A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 5.

In holding that § 2612(a)(1)(C) is appropriate remedial legislation under Section 5, the Ninth Circuit erred. Indeed, each of its alternative rationales is incorrect and significantly departs from this Court's Section 5 jurisprudence. This, too, justifies review, if not summary reversal.

A. The Lower Court's Opinion Is Inconsistent With This Court's Section 5 Jurisprudence.

As a threshold matter, it is clear from this Court's prior decisions that § 2612(a)(1)(C) exceeds Congress's Section 5 remedial power. Under *City of Boerne v. Flores*, 521 U.S. 507 (1997), a federal statute is appropriate remedial legislation if it (i) is aimed at remedying state action that violates Section 1 of the Fourteenth Amendment, and (ii) is proportional and congruent to that purpose. *Id.* 529-34. A statute is *not* aimed at preventing unconstitutional state conduct, however, if Congress fails to identify a "pattern" of such conduct in the act's legislative history. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999). And legislation is *not* congruent and proportional if it applies to all States instead of just those States acting

unconstitutionally, *see United States v. Morrison*, 529 U.S. 598, 626-27 (2000), or it "prohibits substantially more state" practices "than would likely be held unconstitutional." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000). *See also Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-74 (2001).

Section 2612(a)(1)(C) fails to meet either requirement. There is *no* evidence in the FMLA's legislative history indicating that States grant leave to care for a sick family member in an intentionally discriminatory manner. The available evidence, moreover, indicates that States do *not* engage in such unconstitutional conduct. As even the Ninth Circuit acknowledged, the State of Nevada has enacted leave provisions that are "similar to the FMLA" (Pet. App. 7a; *see also id.* 55a–56a), and numerous other States provide their employees *on a gender neutral basis* the same amount of leave as, or *more* family-care leave than is required by, § 2612(a)(1)(C). *See* Alaska Stat. § 39.20.305 (Matthew Bender 2001) (allowing state employees 18 weeks of family-care leave); Cal. Gov't Code § 12945.2 (West 2002) (12 weeks); Conn. Gen. Stat. § 5-248a (West 2002) (24 weeks); Fla. Stat. Ann. § 110.221 (West 2001) (6 months); Miss. Code Ann. § 25-3-93 (2002) (18-27 days of accrued *paid* leave in addition to § 2612(a)(1)(C) leave); N.J. Stat. Ann. § 34:11B-4 (West 2002) (12 weeks); N.D. Cent. Code § 54-52.4-02 (West 2001) (4 months); R.I. Gen. Laws § 28-48-2 (2000) (13 weeks); Tex. Gov't Code Ann. §§ 661.202, 661.912 (Vernon 2002) (12 weeks under § 2612(a)(1)(C) plus accrued sick leave); Vt. Stat. Ann. tit. 21, § 472 (2001) (12 weeks); Va. Code Ann. § 51.1-1107 (West 2001) (32-40 hours of *paid* leave in addition to § 2612(a)(1)(C) leave); *see also* Haw. Rev. Stat. Ann. § 398-3 (West 2001) (four weeks of family-care leave); Me. Rev. Stat. Ann. tit. 26, § 844 (West 2002) (10 weeks); N.C. Gen. Stat. Ann. § 143-300.35 (West 2001) (waiving sovereign immunity of State with respect to disputes about the granting of leave time); Okla. Stat. Ann. tit. 74,

§ 840-2.22 (West 2001) (adopting rules to implement FMLA *and* rules in the event the FMLA is struck down as applied to States).

Even if there were some evidence of unconstitutional gender discrimination, § 2612(a)(1)(C) would not be a congruent and proportional response to that conduct. *See City of Boerne*, 521 U.S. at 530. Section 2612(a)(1)(C) is not a narrow remedy to discrimination: it does not prohibit gender discrimination in the granting of family-care leave or simply require that States grant leave in a gender-neutral manner. Rather, it attempts to create a substantial new federal benefit—an entitlement to twelve weeks of leave and the right to sue a State for money damages in federal court if it fails to provide this benefit. *See* 29 U.S.C. §§ 2615, 2617, Pet. App. 63a–65a. Although this Court has recognized that Section 5 allows Congress to remedy unconstitutional conduct "by *prohibiting* a somewhat broader swath of conduct" than is prohibited by the Constitution, *see Kimel*, 528 U.S. at 81 (emphasis added), it has not held that Congress can use its enforcement power to create an *entitlement*, and if it were to render such a holding, the Court would surely require Congress to identify clear and direct evidence of unconstitutional state conduct that is incurable by traditional prohibitions, which no one can contend is the case here.

In addition, § 2612(a)(1)(C) is not tailored to the States that supposedly grant family-care leave unconstitutionally but applies to all States across the board. Even when considering legislation aimed at remedying *racial* discrimination, the Court has required Congress to tailor its remedy to the States that have a history of discrimination. *See South Carolina v. Katzenbach*, 383 U.S. 301, 328-31 (1966). In light of the fact that numerous States, like Nevada, have enacted statutes "similar to the FMLA" (Pet. App. 7a) and thereby have a demonstrated practice of granting family-care leave in a gender-neutral manner, the FMLA's universal application is disproportionate to any supposed unconstitutional gender

discrimination in the granting of leave. *See supra* pp. 16–17. And there is no explanation by Congress or anyone else about why States should provide *twelve-weeks* of leave, as opposed to some greater or lesser amount of leave depending on each State's employment needs. In sum, "[t]he substantial costs" that § 2612(a)(1)(C) "exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct." *City of Boerne*, 521 U.S. at 534.

Instead of applying the straightforward test established in *City of Boerne*, the Ninth Circuit advanced three alternative rationales for decision that are plainly inconsistent with this Court's Section 5 jurisprudence:

First, the Ninth Circuit incorrectly held that the heightened scrutiny applied to suspect classes under the Court's equal protection jurisprudence required it to *presume* that States act unconstitutionally toward these groups and that, as a law directed at eliminating gender-based classifications, § 2612(a)(1)(C) is presumptively remedial. This analysis is directly contradicted by the Court's decisions in *United States v. Morrison*, 529 U.S. 598 (2000), *City of Boerne*, and *South Carolina v. Katzenbach*, all of which considered legislation that purported to remedy state conduct subject to heightened scrutiny.

In *Morrison*, a case decided nearly two years *before* the Ninth Circuit's decision below but not cited by the court of appeals, this Court invalidated a provision of the Violence Against Women Act ("VAWA") that the Federal Government defended as a remedy to unconstitutional gender discrimination. *See* 529 U.S. at 624-25. Applying its Section 5 jurisprudence, the Court held (in pertinent part) that the VAWA provision was not appropriate remedial legislation because it was not proportional to any alleged unconstitutional gender discrimination: VAWA "appli[ed] uniformly

throughout the Nation" even though "Congress'[s] findings indicate[d] that the problem of discrimination against the victims of gender-motivated crimes d[id] not exist in all States, or even most, States." *Id.* at 626. Importantly, even though VAWA concerned gender discrimination, the Court did not abandon its traditional Section 5 analysis (and certainly did not engage in any burden shifting) but, as it had done numerous times before, required evidence of unconstitutional state conduct and a "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 625-26 (quoting *Florida Prepaid*, 527 U.S. at 639; *City of Boerne*, 521 U.S. at 526).

The same is true of this Court's decision in *City of Boerne*. There, the Court considered whether legislation purporting to preserve religious freedom was appropriate remedial legislation under Section 5. *City of Boerne*, 521 U.S. at 529. Although state laws intentionally discriminating on the basis of religion are subject to a heightened level of scrutiny, the Court did not shift the burden to States to disprove such discrimination simply because the statute at issue raised the specter of religious persecution. Instead, it engaged in a searching and thorough review of actual state practice. *See id.* at 530-31.

Finally, in *South Carolina v. Katzenbach*, the Court upheld provisions of the Voting Rights Act as appropriate remedies to racial discrimination in state voting procedures. *See* 383 U.S. at 315. In concluding that these unconstitutional practices existed, the Court did *not* rely on the fact that discrimination was then common, and it did *not* presume the existence of such practices even though racial discrimination is subject to strict scrutiny. Instead, it reviewed the Act's extensive legislative history and concluded that the history adequately detailed unconstitutional state conduct. *See id.* at 310-15 (summarizing congressional reports based on nine days of testimony by 67 witnesses that described

unconstitutional racial discrimination in state voting procedures).

The Ninth Circuit's burden shifting simply cannot be squared with the Court's analysis in these cases.

Second, the Ninth Circuit held that, because Congress has great "leeway" in compiling evidence of unconstitutional state gender discrimination, the court could infer that States unconstitutionally discriminate when providing *family-care* leave from evidence that state *paternity* leave policies are similar in content to private-sector paternity leave policies and evidence that some private sector employers discriminate when granting paternity leave. Again, however, this sort of inferential leap—assuming unconstitutional state conduct in granting family-care leave from the content of unrelated leave policies—is foreclosed by the Court's prior decisions.

In *Morrison*, for example, the Court explained that it could not infer from evidence of discrimination against victims of gender-motivated crimes in *some* States that such discrimination occurred in *all* States. *See Morrison*, 529 U.S. at 626. Similarly, in *Garrett*, the Court concluded that the Americans with Disabilities Act did not remedy unconstitutional state conduct despite evidence of isolated discrimination by some state officers. *See Garrett* 531 U.S. at 369-72. And in *Kimel*, the Court rejected the idea that the actions of private citizens could be imputed to States. *See Kimel*, 528 U.S. at 89-90. In all cases, the Court refused to infer a statewide pattern of discrimination from some isolated discriminatory acts.

In their concurrence in *Garrett*, Justices Kennedy and O'Connor explained why: "It is *a most serious charge* to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws. . . . States can, and do, stand apart from the citizenry." *Garrett*, 531 U.S. at 375 (emphasis added).

By accusing all States of intentional and unconstitutional gender discrimination in granting leave to care for sick family members when there is *no* evidence suggesting any such discrimination, the Ninth Circuit failed to appreciate the seriousness of its charge and failed to require the kind of detailed evidence of state discrimination that this Court's cases have repeatedly demanded.

Third, the Ninth Circuit concluded that § 2612(a)(1)(C) could be justified as a response to pre-1969 state laws that were supposedly based on then-prevailing stereotypes about women. This rationale is erroneous on a number of levels.

At the outset, this explanation of § 2612(a)(1)(C) does not appear to have been considered by Congress. As the Ninth Circuit acknowledged, Congress did not "specifically recount" the pre-1969 laws that troubled the lower court. Pet. App. 30a. This Court, however, requires that "*Congress* identif[y]," not that courts and parties supply, the unconstitutional conduct that remedial legislation seeks to redress. *Florida Prepaid*, 527 U.S. at 640 (emphasis added).

Putting aside the question whether the Ninth Circuit could create a rationale for § 2612(a)(1)(C) that is not reflected in its legislative history, the court's rationale is insufficient to justify the provision as remedial Section 5 legislation. This Court has repeatedly stressed that, in order to constitute a Section 5 remedy, Congress must cure *actual* unconstitutional conduct. *See City of Boerne*, 521 U.S. at 531-32; *see also Florida Prepaid*, 527 U.S. at 640-41. But the archaic and discredited gender-based laws that concerned the Ninth Circuit have been off the books since at least 1969, if not earlier. And since then, numerous States have enacted gender-neutral leave policies, which according to the Ninth Circuit cures whatever stereotype these laws may have created. *See* Pet. App. 39a–41a. Far from demonstrating continued state discrimination, this history shows that States have *not* allowed

laws based on stereotypes to remain. And, in the absence of a constitutional harm, there can be no remedy under Section 5.

Finally, if the Ninth Circuit were correct and Congress were permitted under Section 5 to require a *fixed gender-neutral benefit* (such as twelve-weeks of leave) to remedy a State's archaic practice of disseminating the benefit unequally, the scope of Section 5 would be substantially broadened. The Federal Government, for example, could require that all state employees work only from 8 a.m. to 3 p.m., because in the early 1900s, some States (apparently believing that women should be home when their children return from school) placed restrictions on the hours women could work (*see* Pet. App. 25a–27a), and this gender-neutral hour requirement would free men and women equally to greet their children. In addition, the Federal Government could require that all States provide a death benefit of $200,000 to their employees' spouses because, in the past, States have given death benefits to widows but not widowers (*see id.* 29a). The Court has never ascribed to such a view of Section 5, however, and to do so, would give it an incredibly broad reach.

B. The Ninth Circuit's Decision Is So Clearly Contrary To Law That It Merits Summary Reversal.

As the above discussion makes clear, the Ninth Circuit's decision abandons this Court's traditional test for determining whether federal legislation is a proper exercise of Congress's power under Section 5. Contrary to this Court's clear holdings in *City of Boerne*, *Florida Prepaid*, *Kimel*, *Garrett*, and *Morrison*, the Ninth Circuit failed to identify in the FMLA's history a pattern of unconstitutional state conduct that would justify characterizing § 2612(a)(1)(C) as remedial. The Ninth Circuit failed to question whether Congress's decision to require *all* States (rather than just those with a demonstrated practice of unconstitutionally discriminating when granting family-care leave) to provide a substantial new benefit to their

employees is congruent to any alleged unconstitutional conduct. Instead, it shifted burdens, made great inferential leaps from scant, unrelated bits of legislative history and attempted to supply a rationale where Congress had none.

The Ninth Circuit abandoned this Court's traditional Section 5 jurisprudence because the FMLA's findings raised the specter of *private* gender discrimination, and in the Ninth Circuit's view, the mere assertion of gender discrimination made this case different from all of this Court's prior decisions. This conclusion, however, is plainly inconsistent with the Court's decision in *Morrison*, which applied the very Section 5 precedent the Ninth Circuit disclaimed and held that federal legislation purportedly aimed at remedying state *gender* discrimination was not a valid exercise of Congress's Section 5 enforcement power. Even though *Morrison* was decided over a year before the decision below and is clearly relevant to this case, the Ninth Circuit *did not even cite it*, an omission that "is nothing short of baffling." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001). In light of these numerous and plain errors, summary reversal under Supreme Court Rule 16(1) is appropriate here. *See id.* at 511 (summary reversal appropriate where lower court's decision is "at odds with [the] governing law"); *Stewart v. LaGrand*, 526 U.S. 115, 118 (1999) (summarily reversing decision that enjoined all executions by lethal gas); *Pounders v. Watson*, 521 U.S. 982, 983 (1997) (summarily reversing court of appeals decision that "misinterpreted . . . constitutional requirements"); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (summarily reversing decision that was a "blatant federal-court nullification of" the law).

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In the final analysis, this petition cleanly presents the question whether § 2612(a)(1)(C) is appropriate remedial legislation under Section 5 of the Fourteenth Amendment, and there is no reason to allow the "uncertainty" that the Ninth

Circuit has introduced into the "routine" employment decisions of "the many [States] within the Court of Appeals' large geographical jurisdiction" to persist. *Pounders*, 521 U.S. at 991.

CONCLUSION

The petition should be granted, and either the Ninth Circuit's decision should be summarily reversed or the Court should hear argument on the question presented.

Respectfully submitted,

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March 2002

APPENDIX

273 F.3d 844

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

William HIBBS, Plaintiff-Appellant,
United States of America, Intervenor,
v.
DEPARTMENT OF HUMAN RESOURCES; Charlotte Crawford; Nikki Firpo, Defendants-Appellees.

No. 99-16321.

Argued and Submitted April 9, 2001
Submission Vacated April 10, 2001
Resubmitted May 1, 2001
Filed Dec. 11, 2001

Appeal from the United States District Court for the District of Nevada; Howard D. McKibben, District Judge, Presiding. D.C. No. CV 98-0205 HDM.

Before: REINHARDT, TASHIMA,* and BERZON, Circuit Judges.

TASHIMA, Circuit Judge:

William Hibbs brought suit in district court against the Nevada Department of Human Resources, its director, Charlotte Crawford, and Hibbs' supervisor, Nikki Firpo (collectively "Defendants"), for violations of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601-

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* Except for Part III.A.3.e, which was authored by Judge Berzon.

2654, and 42 U.S.C. § 1983 and the Fourteenth Amendment, as well as various state-law claims. He timely appeals the district court's grant of Defendants' motion for summary judgment on his federal claims and the dismissal without prejudice of his state-law claims. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

I. BACKGROUND

Hibbs was an employee of the Nevada Department of Human Resources, Welfare Division (the "Welfare Division"). In April and May 1997, he requested leave to care for his ailing wife. His request was approved for the full 480 hours (12 weeks) of leave under the FMLA, to be used intermittently, as needed, between May 1, 1997, and December 31, 1997.

In June 1997, Hibbs requested 379.8 hours of "catastrophic leave," and he was granted 200 hours of such leave. He was informed that the leave would "be counted against [his] annual FMLA leave entitlement." In September 1997, Hibbs requested an additional 179.8 hours of catastrophic leave, and he was granted 180 hours of such leave.

The last day that Hibbs went to work was August 5, 1997; before then, he had already been using his leave time intermittently, as approved. In October 1997, the Welfare Division informed Hibbs that he had exhausted his 12 weeks of FMLA leave. Hibbs requested 200 more hours of catastrophic leave, but his request appears not to have been approved.[1]

By a hand-delivered letter of November 6, 1997, the Welfare Division informed Hibbs that no further leave time would be approved and that he was to report to work on

[1] Hibbs claims that the request was approved, but his citations to the Excerpts of Record provide no support for the claim.

November 12, 1997, or face disciplinary action. When Hibbs failed to report to work and did not call in to explain his absence, he was given a written reprimand in which the Welfare Division ordered him to report to work immediately or face "further disciplinary action up to and including termination."

On December 8, 1997, Hibbs was given a written "Specificity of Charges," which described the disciplinary charges against him, stated that the recommended disciplinary action was dismissal, and informed him that a predisciplinary hearing was scheduled. Hibbs appeared at the hearing, which took place on December 19, 1997; he was not represented by counsel at the hearing, but he had consulted with an attorney beforehand. Hibbs argued that the Welfare Division was misapplying the FMLA and that his unpaid FMLA leave should begin to run after his paid catastrophic leave ended, not concurrently with it. The hearing officer recommended Hibbs' dismissal. Effective December 22, 1997, Hibbs' employment with the Welfare Division was terminated.

On January 7, 1998, Hibbs filed a grievance with the Welfare Division. The grievance was rejected because the grievance procedure is available only to employees and, by then, Hibbs was no longer employed by the Welfare Division. Construing the grievance as an appeal of the decision of the predisciplinary hearing, the Welfare Division forwarded it to the Nevada Department of Personnel. The Nevada Personnel Commission dismissed the appeal with prejudice as untimely.

Hibbs then brought suit in federal district court against Defendants. He sought damages and injunctive and declaratory relief for violations of the FMLA and the Due Process Clause of the Fourteenth Amendment, as well as on several state-law grounds. On Defendants' motion for summary judgment, the district court concluded that the FMLA claim was barred by Nevada's Eleventh Amendment immunity and that Hibbs' Fourteenth Amendment rights had

not been violated. Having granted summary judgment on the federal claims, the district court declined to exercise supplemental jurisdiction over the state-law claims and dismissed them without prejudice to their being pursued in state court. This timely appeal followed. On appeal, the United States has intervened to defend the validity of the FMLA's application to the states.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment *de novo*. *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000). The issue of whether a party is immune from suit under the Eleventh Amendment is reviewed de novo. *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183 n.2 (9th Cir. 1997); *Harrison v. Hickel*, 6 F.3d 1347, 1352 (9th Cir. 1993).

III. DISCUSSION

A. Eleventh Amendment Immunity and the FMLA

"Under the Eleventh Amendment, a state is immune from suit under state or federal law by private parties in federal court absent a valid abrogation of that immunity or an express waiver by the state." *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1115-16 (9th Cir. 2000) (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669-70 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 64-68 (1996)). The same immunity also applies to state agencies. *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982).

Congress can abrogate state sovereign immunity if it both (1) unequivocally expresses its intent to do so, and (2) acts pursuant to a valid exercise of power. *Seminole Tribe*, 517 U.S. at 55, (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Congress cannot abrogate state sovereign immunity by means of its Article I powers. *Id.* at 72-73. It can, however, abrogate

state sovereign immunity by means of its enforcement power under section 5 of the Fourteenth Amendment. *Bd. of Trustees of the Univ. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80, (2000).

There is no case law in our circuit on the validity under the Eleventh Amendment of private FMLA suits against the states.[2] Seven other circuits have held that the FMLA was not enacted pursuant to a valid exercise of Congress' section 5 power. *Laro v. New Hampshire*, 259 F.3d 1, 11 (1st Cir. 2001); *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519, 526, 529 (5th Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001). However, only *Kazmier* expressly involves the FMLA provision at issue in Hibbs' case, namely, § 2612(a)(1)(C), which provides for leave to care for a sick family member. *See Kazmier*, 225 F.3d at 525-26. The other cases either fail to state which provision of the FMLA is at issue or involve only § 2612(a)(1)(D), which provides for ordinary sick leave (i.e., leave occasioned by the employee's own illness). *See Laro*, 259 F.3d at 11; *Townsel*, 233 F.3d at 1095-96; *Chittister*, 226 F.3d at 225; *Sims*, 219

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[2] In *Marchisheck v. San Mateo County*, 199 F.3d 1068 (9th Cir. 1999), we affirmed a district court's grant of summary judgment on the merits to a county defendant in an FMLA suit charging a violation of § 2612(a)(1)(C). We did not inquire whether the county was there acting as "an arm of the state," *see Streit v. County of Los Angeles*, 236 F.3d 552, 559-65 (9th Cir. 2001) (recognizing that a county can act as "an arm of the state"), or, if it was, discuss further the Eleventh Amendment immunity issue, *see Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991) (recognizing that an agency acting as "an arm of the state" is entitled to Eleventh Amendment immunity).

F.3d at 560- 61; *Hale,* 219 F.3d at 65, 69; *Garrett,* 193 F.3d at 1219.[3] The difference matters because § 2612(a)(1)(C) can more plausibly be defended as an attempt to remedy gender discrimination. *See* Part III.A.3.d and e, *infra.* For this reason, none of our sister circuits' cases, except *Kazmier,* is particularly pertinent to the analysis of § 2612(a)(1)(C) under the Eleventh Amendment.

In Hibbs' case, the district court held that Nevada has not waived its Eleventh Amendment immunity. The court also held that the FMLA does not contain a sufficiently clear expression of congressional intent to abrogate Eleventh Amendment immunity, and that, in any case, the FMLA was not enacted pursuant to a valid exercise of the section 5 enforcement power. For the reasons given below, we conclude that the district court erred both in finding that congressional intent to abrogate is not sufficiently clear and in holding that the FMLA was not enacted pursuant to a valid exercise of Congress' section 5 power.

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[3] The district courts are divided on the issue of Eleventh Amendment immunity under the FMLA. *Compare Post v. Kansas,* No. 98-1238-JTM, 1998 WL 928677, at *3 (D. Kan. Dec. 10, 1998) (holding that the FMLA provision regarding ordinary sick leave does not validly abrogate Eleventh Amendment immunity); *Driesse v. Fla. Bd. of Regents,* 26 F. Supp. 2d 1328, 1334 (M.D.Fla. 1998) (same); *McGregor v. Goord,* 18 F. Supp. 2d 204, 209 (N.D.N.Y. 1998) (same for FMLA provision regarding leave to care for an ailing family member); *Thomson v. Ohio State Univ. Hosp.,* 5 F. Supp. 2d 574, 581 (S.D. Ohio 1998) (same as *McGregor*), *with Serafin v. Conn. Dep't of Mental Health & Addiction Servs.,* 118 F. Supp. 2d 274, 278 (D. Conn. 2000) (holding that the FMLA provision regarding leave to care for an ailing family member does validly abrogate Eleventh Amendment immunity); *Biddlecome v. Univ. of Tex.,* No. 96-1872, 1997 WL 124220, at *3 (S.D. Tex. Mar.13, 1997) (same); *Jolliffe v. Mitchell,* 986 F. Supp. 339, 342-43 (W.D. Va. 1997) (same for FMLA provision regarding ordinary sick leave); *Knussman v. Maryland,* 935 F. Supp. 659, 663 (D. Md. 1996) (same for FMLA provision regarding parental leave, but reaching only the "express intent to abrogate" issue).

1. Waiver

Hibbs argues that Nevada has waived its immunity to private suits under the FMLA. Hibbs' argument is based on the following factual allegations: (1) Nevada has enacted a statute similar to the FMLA; (2) Nevada state agencies post information in their offices regarding their employees' rights under the FMLA; and (3) Nevada state agencies teach seminars informing their employees of their rights under the FMLA.

We do not agree. The Supreme Court has held that Eleventh Amendment immunity cannot be constructively waived. *College Sav. Bank,* 527 U.S. at 678, (describing with approval statements in prior cases that "there is 'no place' for the doctrine of constructive waiver in our sovereign- immunity jurisprudence" and that the Court will "'find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'" (quoting *Edelman v. Jordan,* 415 U.S. 651, 673 (1974) (alteration in original))); *id.* at 680 (holding that "the constructive-waiver experiment of *Parden [v. Terminal Ry. of the Ala. State Docks Dep't,* 377 U.S. 184 (1964)] was ill conceived" and that "[w]hatever may remain of [the] decision in *Parden* is expressly overruled"). To waive its Eleventh Amendment immunity, a state must express its consent to suit unequivocally. *Cal. Franchise Tax Bd. v. Jackson (In re Jackson),* 184 F.3d 1046, 1049 (9th Cir. 1999).[4] The alleged

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[4] We have recognized a narrow litigation exception to this doctrine, but it is not applicable here. *See Katz v. Regents of the Univ.,* 229 F.3d 831, 834 (9th Cir. 2000) (finding waiver of Eleventh Amendment immunity where the defense was never asserted in the district court and the university's general counsel submitted a declaration waiving the university's Eleventh Amendment waiver); *Hill v. Blind Indus. & Servs.,* 179 F.3d 754, 756-57 (9th Cir. 1999) (holding that a state agency waived its Eleventh Amendment immunity by defending on the merits and waiting until the opening day of trial to assert its immunity defense). Defendants raised the

facts on which Hibbs relies would at most amount to an ambiguous constructive waiver, not the kind of unequivocal waiver that is required.[5] In addition, Nevada has expressly declined to waive its Eleventh Amendment immunity. Nev. Rev. Stat. 41.031(3) ("The State of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States.").

For all of these reasons, the district court was correct in concluding that Nevada has not waived its immunity to private suits under the FMLA.

2. Express Congressional Intent to Abrogate

Both Hibbs and the United States argue that the district court erred in finding that the FMLA does not contain a sufficiently clear expression of congressional intent to abrogate state sovereign immunity. We agree that the district court erred.

In *Kimel,* the Supreme Court held that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, clearly expressed congressional intent to abrogate state sovereign immunity, because the ADEA incorporates by reference an enforcement provision of the Fair Labor

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defense of Eleventh Amendment immunity in their answer to Hibbs' complaint.

[5] Moreover, the alleged facts probably do not even amount to a constructive waiver. Nevada's putative immunity from private suits under the FMLA does not imply that Nevada is not bound by the requirements of the FMLA or that Nevada is immune from enforcement suits brought by the United States. *Cf. Garrett,* 121 S. Ct. at 968 n.9 (noting that even though the states are immune from private suits under the Americans with Disabilities Act ("ADA"), the states are still bound by the standards of the ADA, which are enforceable through actions brought by the United States). For this reason, Nevada can consistently (1) inform its employees that they have rights to various kinds of leave under the FMLA, and (2) deny that its employees can bring private suits to enforce those rights.

Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, that "clearly provides for suits by individuals against states." *Kimel,* 528 U.S. at 73-74. The FLSA provision authorizes suits by employees for legal and equitable relief, including back pay and reinstatement, "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). As the Court emphasized, "public agency" is defined as including both "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." *Id.* § 203(x); *see Kimel,* 528 U.S. at 74. The Court found that, read together, § 216(b) and § 203(x) clearly express congressional intent to abrogate state sovereign immunity from suits by individuals. *Kimel,* 528 U.S. at 74.

The enforcement provisions of the FMLA use language that is identical to the relevant language of the FLSA. The FMLA authorizes suits by employees "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 2617(a)(2). The FMLA's definition of "employer" includes "any 'public agency' as defined in section 203(x) of this title." *Id.* § 2611(4)(A)(iii). The Court's decision in *Kimel* therefore compels the conclusion that the FMLA includes a sufficiently clear expression of congressional intent to abrogate state sovereign immunity. Every circuit that has addressed this question has agreed. *Chittister,* 226 F.3d at 228; *Sims,* 219 F.3d at 562; *Hale,* 219 F.3d at 67.

Thus, the district court erred in concluding that the FMLA does not contain a sufficiently clear expression of congressional intent to abrogate state sovereign immunity.

3. Valid Exercise of the Section 5 Power

a. Doctrinal Background

Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions"

of the amendment. U.S. Const. amend. XIV, § 5. Valid section 5 legislation must be aimed at remedying or deterring violations of the Fourteenth Amendment's substantive provisions, but it "is not limited to mere legislative repetition of [the Supreme Court's] constitutional jurisprudence." *Garrett,* 121 S. Ct. at 963*; see also Kimel,* 528 U.S. at 81. Because "[d]ifficult and intractable problems often require powerful remedies," *id.* at 89, "Congress' power to 'enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *id.* at 81. *See Garrett,* 121 S. Ct. at 963.

In enacting such prophylactic legislation, however, Congress must not cross the line between "appropriate remedial legislation" and legislation that amounts to "substantive redefinition of the Fourteenth Amendment right at issue." *Kimel,* 528 U.S. at 81. The Supreme Court has policed this boundary by requiring that there be "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* (quoting *City of Boerne v. Flores,* 521 U.S. 507, 520 (1997))*; see also Garrett,* 121 S. Ct. at 963. The congruence and proportionality inquiry requires a reviewing court (1) "to identify with some precision the scope of the constitutional right at issue," *Garrett,* 121 S. Ct. at 963, and (2) to determine whether the statute in question is "an appropriate remedy" for violations of that right, perhaps by scrutinizing the statute's legislative history, *Kimel,* 528 U.S. at 88. *See also id.* at 89 ("'The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted

response to another, lesser one.'" (quoting *City of Boerne,* 521 U.S. at 530)).[6]

The recent Supreme Court cases developing and applying this doctrine have dealt with federal statutes that prohibit discrimination on the basis of age and disability. *See Garrett,* 121 S. Ct. at 967-68 (holding that the ADA is not valid section 5 legislation)*; Kimel,* 528 U.S. at 91 (same with respect to the ADEA). The Court's analyses in those cases depended heavily upon the fact that age and disability classifications are not subject to heightened scrutiny under the Equal Protection Clause. *See Garrett,* 121 S. Ct. at 963-64*; Kimel,* 528 U.S. at 83-89. Consequently, those cases offer limited guidance in the case at bench. Here, intervenor United States has defended the constitutionality of the FMLA on the ground that it is aimed at remedying and preventing gender discrimination, and gender discrimination is subject to heightened scrutiny. *See, e.g., United States v. Virginia,* 518 U.S. 515, 533 (1996) (holding that state-sponsored gender discrimination violates equal protection unless it "serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives" (internal quotation marks omitted)).

The post-*Seminole Tribe* case law from the circuit courts does little to clarify how the congruence and proportionality inquiry changes when the legislation is meant to remedy or prevent gender discrimination, rather than discrimination with respect to a nonsuspect classification. A number of circuits have held that the Equal Pay Act ("EPA") and Title IX of the Education Amendments of 1972 are valid section 5 legislation

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[6] In describing the congruence and proportionality inquiry, we have not followed our circuit's prior approach in *In re Mitchell,* 209 F.3d 1111. *In re Mitchell* was decided at essentially the same time as *Kimel* and contains no citation to *Kimel.* We therefore take *Kimel* and *Garrett* to be superseding authority. There is no post-*Kimel* case law in our circuit on congruence and proportionality.

aimed at preventing gender discrimination, but the analysis in those cases is sparse and rests largely on the fact that the EPA and Title IX prohibit almost no conduct beyond what the Equal Protection Clause itself prohibits. *See Varner v. Ill. State Univ.*, 226 F.3d 927 (7th Cir. 2000) (EPA); *Kovacevich v. Kent State Univ.*, 224 F.3d 806 (6th Cir. 2000) (EPA); *Hundertmark v. Fla. Dep't of Transp.*, 205 F.3d 1272 (11th Cir. 2000) (EPA); *O'Sullivan v. Minnesota*, 191 F.3d 965 (8th Cir. 1999) (EPA); *Ussery v. Louisiana*, 150 F.3d 431 (5th Cir. 1998) (EPA); *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998) (Title IX); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997) (Title IX). Those cases consequently do not explain how legislation that is meant to prevent gender discrimination, but that sweeps substantially more broadly than the Equal Protection Clause, should be analyzed under section 5. Only *Kazmier*, which held that the FMLA provision regarding leave to care for an ailing family member (i.e., § 2612(a)(1)(C)) is not valid section 5 legislation, provides a detailed analysis of the issue. *See Kazmier*, 225 F.3d at 524-27.[7]

b. Scope of the Constitutional Right at Issue

The first step in the congruence and proportionality inquiry is "to identify with some precision the scope of the constitutional right at issue." *Garrett*, 121 S. Ct. at 963. The United States defends § 2612(a)(1)(C) on the ground that it is meant to remedy and prevent unconstitutional gender discrimination.[8] The argument is supported by the text of the FMLA. *See* 29 U.S.C. § 2601(a)(5) ("Congress finds that . . .

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[7] We address *Kazmier*'s analysis, which we find unpersuasive, in Part III.A.3.c, *infra*.

[8] Hibbs himself presents no arguments regarding the validity of Congress' purported exercise of its section 5 power—his only Eleventh Amendment arguments relate to the clarity of Congress' expression of its intent to abrogate state immunity.

due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men . . . ."); *id.* § 2601(b)(4) ("It is the purpose of this Act . . . to accomplish [the Act's previously described purposes] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis. . . .").

The United States argues that because women are regarded as having "the primary responsibility for family caretaking" (both for infants and for sick family members), employers commonly offer less caretaking leave to men than to women. The United States further concludes that this kind of gender-discriminatory leave policy is harmful both to men—because they are not given enough leave to care for their families—and to women—because reduced leave for men forces women to spend more time taking care of their families, and women's consequently greater needs for caretaking leave make them less attractive job candidates than men. Additionally, as we explain later, it appears that in enacting the FMLA Congress was also striving, in light of a long history of unconstitutional legislation mandating stereotypical family roles, to remedy the gender-discriminatory impact of employer policies that provide no family leave at all. The statute aims to remedy all these forms of discrimination by setting a gender-neutral minimum standard for the granting of caretaking leave. *Cf. Laro*, 259 F.3d at 12 (noting that the argument in support of a valid Eleventh Amendment waiver is stronger with respect to the parental and family-care leave provisions than it is with respect to personal medical leave).

State-sponsored gender discrimination is subject to "intermediate scrutiny" under the Equal Protection Clause.

Such discrimination is thus unconstitutional unless it is substantially related to the achievement of an important governmental interest. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) ("[O]ur precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives."). In addition, the burden is on the defender of such discrimination to prove that the standard has been met. *See, e.g., Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) ("[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an exceedingly persuasive justification for the challenged classification." (internal quotation marks omitted)); *Wengler*, 446 U.S. at 151 ("The burden . . . is on those defending the discrimination to make out the claimed justification. . . .").

This allocation of the burden of proof has the effect of creating a rebuttable presumption of unconstitutionality for state-sponsored gender discrimination. This contrasts sharply with the treatment of age and disability classifications, which are subject to rational basis review. The burden is entirely on the challenger of state-sponsored age or disability discrimination to prove that the discrimination is not rationally related to any conceivable legitimate governmental interest. *See Garrett*, 121 S. Ct. at 964 ("[T]he burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." (internal quotation marks omitted)); *Kimel*, 528 U.S. at 84 ("[T]he individual challenging [the discrimination] bears the burden of proving that the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." (internal quotation marks omitted)). In this way, such classifications are presumptively constitutional.

Judicial application of heightened scrutiny to state-sponsored gender discrimination is justified largely on the basis of the following analysis: (1) Gender differences are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," *Kimel*, 528 U.S. at 83 (internal quotation marks omitted) (contrasting race and gender with age); and (2) Individuals who suffer discrimination on the basis of gender have "been subjected to a history of purposeful unequal treatment," *id.* (internal quotation marks omitted) (contrasting race and gender with age).

c. Section 5 and Heightened Scrutiny

Section 2612(a)(1)(C) of the FMLA prohibits a broad range of state conduct that is not prohibited by the Equal Protection Clause's protection against invidious gender discrimination. Section 2612(a)(1)(C) does not merely prohibit gender discrimination in the states' granting of leave to their employees to care for ailing family members. Rather, it requires states to grant at least 12 weeks of such leave on a gender-neutral basis. If states granted only 11 or 10 weeks of such leave, or even none at all, and they did so in a gender-neutral manner, they presumably would not thereby be engaging in unconstitutional gender discrimination, without more, but would nonetheless violate § 2612(a)(1)(C). Thus, § 2612(a)(1)(C) sweeps more broadly than the Equal Protection Clause itself.

This fact does not, however, establish that § 2612(a)(1)(C) is not valid section 5 legislation. As the Supreme Court has explained, "[d]ifficult and intractable problems often require powerful remedies," which may include "reasonably prophylactic legislation." *Kimel*, 528 U.S. at 88. The question, then, is whether § 2612(a)(1)(C) is "just such an appropriate remedy or, instead, merely an attempt to

substantively redefine States' legal obligations" under the Fourteenth Amendment. *Id.*

In answering this question, the Court in both *Kimel* and *Garrett* examined the relevant legislative histories to see if they contained evidence of the sort of difficult and intractable problems that would justify such broad remedies. *See Garrett,* 121 S. Ct. at 964-68; *Kimel,* 528 U.S. at 88-90. Moreover, the Court's opinion in *Garrett* could be taken to imply that adequate support in the legislative record is *always* a requirement for a valid exercise of Congress' section 5 power. *See Garrett,* 121 S. Ct. at 964 ("Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."). Such a requirement, however, would be at odds with both *Kimel* and at least one other post-*Seminole Tribe* decision of the Court. *See Kimel,* 528 U.S. at 88 (describing the examination of legislative history as merely "[o]ne means by which [the Court has] made such a determination in the past"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 646 (1999) ("[T]he lack of support in the legislative record is not determinative. . . ."). In addition, for the courts to impose such a procedural requirement on Congress, in effect requiring that Congress gather and document sufficient evidence to support the exercise of its constitutionally granted powers, would raise fundamental separation of powers concerns—the courts would be treating Congress more like an administrative agency than like a co-equal branch of the federal government. *Cf.* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes,* 86 Cornell L. Rev. 328, 373-83 (2001) (describing the constitutional difficulties with judicial imposition of such a procedural requirement on Congress).

For all of these reasons, we conclude that *Garrett* should not be taken to impose such a requirement, but rather should be interpreted as following *Kimel*'s approach: Examination of legislative history is merely one means by which a court can determine whether the broad prophylactic legislation under consideration is justified by the existence of sufficiently difficult and intractable problems. *See also Kilcullen v. N.Y. State Dep't of Labor,* 205 F.3d 77, 80-81 (2d Cir. 2000), *overruled on other grounds,* 531 U.S. 356 (2001). "The ultimate question remains not whether Congress created a sufficient legislative record, but rather whether, given all of the information before the Court, it appears that the statute in question can appropriately be characterized as legitimate remedial legislation." *Id.* at 81.

There is a further point about *Kimel* and *Garrett*'s treatment of the "appropriate remedy" inquiry that informs our analysis here: In each case, after failing to find in the legislative record sufficient evidence of a history and pattern of unconstitutional conduct by the states, the Court determined that the challenged federal statutes were not valid section 5 legislation. In effect, this approach means that the relevant provisions of the ADA and the ADEA were subject to a *presumption of unconstitutionality*—the burden was on the defenders of the legislation to prove that it was valid under section 5. While the creation of such a presumption might appear extraordinary and incongruous, it makes sense in light of the Court's emphasis on the fact that state-sponsored age and disability discrimination is *not* subject to heightened scrutiny. The presumption of unconstitutionality applied to the ADA and the ADEA thus is merely the flip side of the presumption of constitutionality that is accorded to state-sponsored age and disability discrimination. Because rational-basis review makes unconstitutional age and disability discrimination exceedingly uncommon, Congress must bear the heavy burden of proving that such discrimination really does exist to an extent that justifies broad use of its section 5 power.

For all of these reasons, we are persuaded that the FMLA should be treated differently from both the ADA and the ADEA because the FMLA is aimed at remedying gender discrimination, which is subject to heightened scrutiny. Because state-sponsored gender discrimination is presumptively unconstitutional, section 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional.[9] That is, the burden is on the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct. As the Supreme Court has acknowledged, the heightened scrutiny applied to state-sponsored gender discrimination reflects judicial recognition of the fact that persons who suffer discrimination on the basis of gender have been "subjected to a history of purposeful unequal treatment." *Kimel,* 528 U.S. at 83. Thus, the Court has long recognized just the kind of history of invidious gender discrimination by states that it was unable to find, in *Kimel* and *Garrett,* with respect to age and disability. It therefore makes sense to put the burden of proof on the challenger of a statute like the FMLA, to prove the absence of the sort of gender discrimination that the Court has found to be longstanding and widespread.

Consequently, we conclude that Congress has validly exercised its section 5 power by giving private individuals the right to sue states for violations of § 2612(a)(1)(C).

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[9] As we noted in Part III.A.3.b, *supra,* the FMLA is expressly aimed at preventing gender discrimination. *See* 29 U.S.C. § 2601(a)(5), (b)(4). There is nothing in the record before this court to indicate that this stated purpose is in any sense a "sham," and the statistics on leave policies and historical record that we discuss *infra* indicate that there is a need for such a prophylactic measure. *Cf. Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 727-30 (1982) (concluding that "compensat[ing] for discrimination against women" could not be the "actual purpose" behind the policy of excluding men from the Mississippi University for Women School of Nursing, because statistics showed that women had long dominated the field of nursing).

Defendants have failed to show that there is not a widespread pattern of gender discrimination by states regarding the granting of leave to employees to care for sick family members or a historical record of state enforcement of stereotypical family roles.

We recognize that, in *Kazmier,* the Fifth Circuit held to the contrary, that Congress did not validly exercise its section 5 power in enacting § 2612(a)(1)(C). *Kazmier,* 225 F.3d at 526-27. The court's analysis closely tracks the analysis in *Kimel.* In particular, the only place at which the court took the difference between age discrimination and gender discrimination into account was in determining the scope of the constitutional right whose violation the statute was meant to prevent. *See id.* at 525-26. Consequently, the court held the legislative history to the same exacting standard that was applied in *Kimel* (and subsequently in *Garrett*): The legislative history must contain "evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions." *Id.* at 524 (footnote omitted); *see also id.* ("Legislation that abrogates immunity must be proportional with and congruent to an *identified pattern* of actual constitutional violations by the States." (footnote omitted)).

We find *Kazmier's* analysis unpersuasive and we decline to follow it, for the reasons we have given. In particular, (1) it assumes that adequate evidentiary support in the legislative history is *always* a requirement for a valid exercise of the section 5 power, and (2) it fails to acknowledge the ways in which the heightened scrutiny to which state-sponsored gender discrimination is subject justifies shifting or modifying the burden of proof in the legislative history inquiry.[10]

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[10] Kazmier was decided by a divided panel. The dissent argued in part that when purported section 5 legislation is meant to remedy race or gender discrimination, it should be analyzed under *Katzenbach v. Morgan* broad construction of the section 5 power, not *City of Boerne* and *Kimel's*

d. Legislative History and Discrimination in Granting Leave

Alternatively, we also hold that the legislative history of the FMLA contains substantial evidence of gender discrimination with respect to the granting of leave to state employees, and that it therefore justifies the enactment of the FMLA as a prophylactic measure.

The FMLA's legislative history reflects that a 1990 Bureau of Labor Statistics (the "BLS") survey found that 37 percent of surveyed private-sector employees were covered by "maternity" leave policies, while only 18 percent were covered by "paternity" leave policies. S. Rep. No. 103-3, at 14-15, *reprinted in* 1993 U.S.C.C.A.N. 3, 17. The numbers from a similar BLS survey the previous year were 33 percent and 16 percent, respectively. *Id.* Thus, while these data show that a larger percentage of employees were covered in 1990 than in 1989, they also show a widening of the gender gap in leave policy during the same period. In addition, while the BLS surveyed only private employers, an extensive study of the private and public sectors done by the Yale Bush Center Infant Care Leave Project revealed that "[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees." *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the Committee on Education and Labor,* 99th Cong. 33 (1986) (prepared statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project)*; see also id.* at 29-30 ("We did a survey of the public sector, a survey of Federal employees, all 50 States, and of the military. We have studied small businesses, mid-size businesses and large businesses to find out what they are offering. . . . We found

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narrower approach. *See* 225 F.3d at 533-35 (Dennis, J., dissenting).

that public sector leaves don't vary very much from private sector leaves.") (testimony of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project).

Taken together, the BLS and Yale Bush Center surveys constitute substantial evidence of unconstitutional state-sponsored gender discrimination in leave policies for state employees. The studies show significant gender-based disparities in the coverage of state leave *policies.* They thus indicate widespread *intentional* gender discrimination by states. Moreover, the studies show that this discrimination has persisted despite the existence of 42 U.S.C. § 1983 and Title VII, long after the 1978 enactment of the Pregnancy Discrimination Act made discrimination on the basis of pregnancy an actionable form of gender discrimination under Title VII. Altogether then, the studies show that states' discriminatory leave policies are just the sort of difficult and intractable problem that justifies broad prophylactic measures in response.

We recognize that a weakness in this evidence as applied to Hibbs' case is that the BLS and Yale Bush Center studies deal only with parental leave, not with leave to care for a sick family member. They thus do not document a widespread pattern of precisely the kind of discrimination that § 2612(a)(1)(C) is intended to prevent. But the studies do nonetheless constitute strong circumstantial evidence of state-sponsored gender discrimination in the granting of leave to care for a sick family member, because if states discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other.

Here again, the fact that the FMLA is aimed at remedying gender discrimination, rather than discrimination with respect to a nonsuspect classification, informs our analysis. Because the heightened scrutiny applied to state-sponsored gender discrimination reflects judicial recognition of the fact that persons who suffer discrimination on the basis of gender have

been "subjected to a history of purposeful unequal treatment," *Kimel,* 528 U.S. at 83, we conclude that courts have more latitude in drawing inferences from the legislative history of a federal statute aimed at remedying state-sponsored gender discrimination than in drawing inferences from the histories of statutes like the ADA and the ADEA, which aim to remedy discrimination with respect to nonsuspect classifications. For this reason, we conclude that the evidence in the FMLA's legislative history is sufficient to justify Congress' broad use of its section 5 power in enacting § 2612(a)(1)(C). On this basis as well, then, we hold that Congress validly exercised its section 5 power when it gave state employees the right to sue their employers for violations of § 2612(a)(1)(C).[11]

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[11] The fact that the statute grants a substantive benefit, namely, 12 weeks of leave, to all employees does not mean that it cannot constitute valid enforcement legislation under section 5. The statute aims to prevent gender discrimination in the granting of leave by guaranteeing a minimum level of leave on a gender-neutral basis. When narrow antidiscrimination measures like Title VII and § 1983 have proven ineffective, broad prophylactic legislation is justified, as the Court recognized in *Kimel. See* 528 U.S. at 88-89. In addition, the seeming arbitrariness of guaranteeing 12 weeks, rather than 11 or 10 or some other number, cannot be determinative. Prophylactic legislation will always, by definition, prohibit more conduct than the Equal Protection Clause itself, and any line that Congress draws that extends beyond the Constitution's requirements will seem to some extent arbitrary. Compare *Katzenbach v. Morgan,* 384 U.S. 641 (1966), in which the Court found that Congress had validly exercised its section 5 power by enacting a statute that provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. *Id.* at 643. The Court was not troubled by the fact that the statute provides a substantive benefit that is not required by the Equal Protection Clause, namely, freedom from literacy requirements in the exercise of voting rights. Nor was the Court bothered by Congress' choice of the sixth grade, rather than the fifth or fourth or some other grade, as the threshold condition for entitlement to the benefit. Although *Morgan's* broad construction of the section 5 power, as analogous to Congress' power

e. The FMLA As a Remedy for State Legislation Fostering Traditional Gender Roles**

There is one more basis for concluding that the FMLA fits within Congress' Fourteenth Amendment authority: In providing for minimum levels of leave for employees to care for family members, Congress was acting against a background of state-imposed systemic barriers to women's equality in the workplace that, under recent constitutional doctrine, were undoubtedly unconstitutional. The FMLA can be understood as, in part, an appropriately limited scheme designed to undo the impact of that history of state-supported and mandated sex discrimination as it continues to affect private and public employment.

The modern trend noted above to provide more generous family care leave to women is related to that historical background: That trend reflects the flip side of the stereotypical assumption that women are marginal workers whose fundamental responsibilities are in the home. At the same time, the framers of the FMLA were at least equally concerned with the failure of many employers to provide family care leave to *anyone,* with the result—given the history of state-supported treatment of women as nonessential workers, with principal responsibility for the family—that women most often were the ones who left their jobs to care for family members. While the failure to provide any such leave is not itself unconstitutional, Congress was acting not in a vacuum but against the background of unconstitutional state

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under the Necessary and Proper Clause, has been superseded by the narrower approach of *City of Boerne* and its progeny, the Court has never overruled *Morgan* or even hinted that it is no longer good law on its facts.

** This section was authored by Judge Berzon, originally as a separate concurring opinion. Because the panel unanimously agrees with its reasoning, it is included as Part III.A.3.e of the court's opinion.

laws concerning the role of women in the workplace. Congress therefore appropriately enacted the FMLA under the Fourteenth Amendment as, in part, a congruent and proportional remedy for the continuing effects of past unconstitutional gender discrimination in employment *by the states,* readjusting workplace norms in both private and public workplaces so as to foster equal participation in both economic and domestic life by both men and women.

(i) The Historical Record

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson,* 411 U.S. 677, 684 (1973) (plurality opinion) (quoted in *Virginia,* 518 U.S. at 531*; see also Kimel,* 528 U.S. at 83 (recognizing "a history of purposeful unequal treatment" on the basis of gender). That history underlies the modern jurisprudence recounted above, requiring "[p]arties who seek to defend gender-based government action [to] demonstrate an 'exceedingly persuasive justification' for that action." *Virginia,* 518 U.S. at 531. Because "[t]oday's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history[,]" *id.,* some detailed consideration of relevant aspects of that history is useful in evaluating the appropriate role of Congress when acting under section 5 of the Fourteenth Amendment to end sex discrimination.

In the employment context, from the beginning of our Nation's history until at least the 1970's, state laws supported a regime in which men and women were assigned, respectively, roles as workers and homemakers. State labor legislation, in the guise of protecting women, played a major role in limiting women's access to the workplace—and concomitantly, in discouraging the involvement of men in domestic duties, including caring for children and relatives.

Before 1969, every state had some form of labor legislation "protective" of women only. [12] Judith A. Baer, *The Chains of Protection: The Judicial Response to Women's Labor Legislation* 4 (1978) (*"hereinafter 'Chains of Protection'"*). By 1917, thirty-eight states had laws limiting in some way the hours that women—but not men—could work for wages. Barbara Allen Babcock *et al., Sex Discrimination and the Law: Causes and Remedies* 247 (1975) (hereinafter "*Causes and Remedies*"); *see also Muller v. Oregon,* 208 U.S. 412, 419 n.1 (1908) (listing—and approving—laws from 19 states limiting the hours that women could work). And, as is true of the other sex discriminatory laws discussed below, hours laws remained on the books well into the second half of the 20th century. *See, e.g., Corning Glass Works v. Brennan,* 417 U.S. 188, 193 n.7 (1974) (Pennsylvania and New York laws not repealed until 1969, and had continuing impact thereafter on women's wages); *Rosenfeld v. So. Pac. Co.,* 293 F. Supp. 1219 (C.D.Cal. 1968).

Hours laws took two forms: A majority of states enacted laws setting a maximum number of hours that women could work in certain industries, without so legislating for men. *People v. Elerding,* 98 N.E. 982, 985 (Ill. 1912) (stating that

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[12] Good intentions—including the desire to protect women from harmful work conditions—do not render such gender classifications constitutional. *See Miss. Univ. for Women,* 458 U.S. at 725 ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); *Virginia,* 518 U.S. at 533 (gender classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *see also Sail'er Inn, Inc. v. Kirby,* 485 P.2d 529, 541 (Cal. 1971) ("Laws which disable women from full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.").

by 1912, twenty-seven states had adopted such laws).[13] Maximum hours laws barred women from earning overtime and hindered women's employment opportunities by excluding them from jobs requiring overtime. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism,* 14 Women's Rts. L. Rep. 151, 170 n.114 (1992) (hereinafter "*Equality Crisis*").

Other state laws prohibited the employment of women—but, again, not men—during night hours. *People v. Charles Schweinler Press,* 108 N.E. 639 (N.Y. 1915) (affirming a law prohibiting women from working in factories at night, and noting that by 1913 nine other states had passed such laws).[14] Night hour laws precluded women not only from working night shift jobs but also from obtaining more desirable day shift jobs that required employees initially to work night hours. *Equality Crisis* at 170 n.114.

States legislatures also limited women's employment opportunities by placing a restriction on the amount of weight

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[13] *See also, e.g., Radice v. New York,* 264 U.S. 292 (1924); *Bosley v. McLaughlin,* 236 U.S. 385 (1915) (California statute); *Ex parte Miller,* 124 P. 427 (Cal. 1912), *aff'd, Miller v. Wilson,* 236 U.S. 373 (1915); *Elerding,* 98 N.E. at 985 (Illinois statute); *Commonwealth v. Riley,* 97 N.E. 367 (Mass. 1912), *aff'd,* 232 U.S. 671 (1914); *Commonwealth v. Hamilton Mfg. Co.,* 120 Mass. 383 (Mass. 1876); *Withey v. Bloem,* 128 N.W. 913 (Mich. 1910); *Wenham v. State,* 91 N.W. 421 (Neb. 1902); *Stettler v. O'Hara,* 139 P. 743 (Or. 1914) (en banc), *aff'd, Simpson v. O'Hara,* 243 U.S. 629 (1917); *State v. Muller,* 85 P. 855 (Or. 1906), *aff'd,* 208 U.S. 412 (1908); *State v. Somerville,* 122 P. 324 (Wash. 1912); *State v. Buchanan,* 70 P. 52 (Wash. 1902).

[14] *See also, e.g., Radice,* 264 U.S. at 293 (New York law prohibiting women from working in restaurants at night); *Wenham,* 91 N.W. at 422 (Nebraska statute); *see also* Eliot A. Landau & Kermit L. Dunahoo, *Sex Discrimination in Employment: A Survey of State and Federal Remedies,* 20 Drake L. Rev. 417, 448 (1971) (hereinafter "*Sex Discrimination*") (in 1969, eighteen states had night hour laws applicable to women only).

that women (but not men) could lift on the job,[15] and by prohibiting women (but again, not men) from cleaning moving machinery, *Chains of Protection* at 31 (fourteen machinery laws by 1908). Likewise, state laws requiring that women receive lunch breaks or rest periods made women less desirable employees than men.[16]

Between 1912 and 1923, fifteen states passed minimum wage laws for women only. *Causes and Remedies* 247.[17] As the Supreme Court recognized, "prescribing of minimum wages for women alone . . . restrain[ed] them in competition with men and tend[ed] arbitrarily to deprive them of employment and a fair chance to find work." *New York ex rel. Tipaldo,* 298 U.S. at 617.[18]

State laws also barred women from certain occupations, either by outright prohibitions or by refusing to grant women necessary licenses. The occupations from which some states

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[15] *See, e.g., Weeks v. Southern Bell Tel. & Tel. Co.,* 408 F.2d 228 (5th Cir. 1969) (Georgia statute); *Richards v. Griffith Rubber Mills,* 300 F. Supp. 338 (D.Ore. 1969); *Rosenfeld,* 293 F. Supp. at 1224 (California statute); *see also Sex Discrimination* 450 (10 states had such laws in 1969).

[16] *See, e.g., Burns v. Rohr Corp.,* 346 F. Supp. 994 (S.D.Cal. 1972); *see also Sex Discrimination* 447 (In 1969, twenty-two states required that employers grant women lunch breaks, and thirteen states required that employers grant women rest breaks; these laws did not apply to male employees.).

[17] *See also, e.g., West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937) (Washington statute); *Morehead v. New York ex rel. Tipaldo,* 298 U.S. 587 (1936); *Topeka Laundry Co. v. Court of Industrial Relations,* 237 P. 1041 (Kan. 1925); *Stevenson v. St. Clair,* 201 N.W. 629 (Minn. 1925); *Stettler,* 139 P. at 749 (Oregon statute).

[18] In 1969 ten states still had minimum wage laws applicable to women only. *Sex Discrimination* 449.

excluded women completely included the practice of law,[19] working as a bartender or in an establishment selling liquor,[20] mining,[21] and wrestling.[22]

In addition, state laws providing that widows, but not widowers, automatically received workers' compensation or similar benefits at the death of a working spouse[23] discriminated against women workers because of the "offensive assumption . . . that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Wengler,* 446 U.S. at 142 (internal quotation marks and citation omitted).[24]

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[19] *See, e.g., In re Bradwell,* 55 Ill. 535 (1869), *aff'd, Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130 (1872); *In re Lavinia Goodell,* 39 Wis. 232, 1875 WL 3615 (1875); *In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law* (Minn. C.P. Hennepin Cty., 1876), in *The Syllabi,* Oct. 21, 1876, pp. 5, 6 (cited in *Virginia,* 518 U.S. at 543).

[20] *Goesaert v. Cleary,* 335 U.S. 464 (1948) (Michigan statute); *Henson v. City of Chicago,* 114 N.E.2d 778 (Ill. 1953); *Blair v. Kilpatrick,* 40 Ind. 312 (Ind. 1872); *Sail'er Inn, Inc.,* 485 P.2d at 531 (California statute); *Ex parte Hayes,* 33 P. 337 (Cal. 1893); *State v. Considine,* 47 P. 755, *aff'd, In re Considine,* 83 F. 157 (D.Wash. 1897).

[21] U.S. Dep't of Labor, *Summary of State Laws for Women* 17 (1969) (in 1969, seventeen states had laws prohibiting the employment of women in mines).

[22] *Oregon v. Hunter,* 300 P.2d 455 (Or. 1956) (en banc).

[23] *See, e.g., Wengler,* 446 U.S. 142 (Missouri statute); *Arp v. Workers' Compensation Appeals Bd.,* 563 P.2d 849 (Cal. 1977); *Passante v. Walden Printing Co.,* 385 N.Y.S.2d 178 (1976); *Tomarchio v. Township of Greenwich,* 379 A.2d 848 (N.J. 1977).

[24] State laws outside the labor context also perpetuated the ideology of separate spheres. For instance, "alimony statutes were part and parcel of a larger statutory scheme which invidiously discriminated against women,

In upholding the discriminatory laws described above, state courts made clear that the basis, and validity, of such laws lay in stereotypical beliefs about the appropriate roles of men and women.[25] For instance, in upholding an hours law, the Supreme Court of Illinois relied upon the need for women to conserve their energy for "the proper discharge of the maternal functions" and "the maintenance of the home." *Elerding,* 98 N.E. at 985. The Supreme Court of Nebraska found similar legislation valid because of its concern that if women worked longer hours in the workplace they would be "incapable of bearing their share of the burdens of the family and the home." *Wenham,* 91 N.W. at 425 (quoted in *Muller,* 85 P. at 857). Likewise, the Court of Appeals of New York noted that night work interfered with "the peculiar functions which have been imposed upon [women] by nature." *Charles Schweinler Press,* 214 N.Y. at 400-03, 405-06, 108 N.E. 639. The legislature was justified in enacting the night hours law not only for women's sake, said the New York court, "but, as is

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removing them from the world of work and property and 'compensating' them by making their designated place 'secure.'" *Orr v. Orr,* 440 U.S. 268, 279 n.9 (1979). Although alimony provided a benefit to the individual woman who received it, "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection." *Id.* at 283. States also discriminated against women in the field of education, depriving women of future opportunities in the marketplace. *See, e.g., Virginia,* 518 U.S. at 557.

[25] Because this case hinges on the impact of the Eleventh Amendment, we have focused only on state court opinions upholding state sex discrimination in employment. We recognize, however, that federal as well as state legislation and court opinions shaped and perpetuated the notion that governmental action could constitutionally relegate domestic duties principally to women. *See, e.g., Goesaert,* 335 U.S. at 465-66 (federal court relying on the separate spheres ideology to uphold a discriminatory state law); *Muller,* 208 U.S. at 420-23 (same); *see also, e.g., Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975) (striking down federal social security law incorporating similar gender stereotypes).

and ought to be constantly and legitimately emphasized, for the sake of the children whom a great majority of them will be called on to bear." *Id.*[26]

"Such judgments have attended, and impeded, women's progress toward full citizenship stature throughout our Nation's history." *Virginia,* 518 U.S. at 542. Although the FMLA's legislative history does not specifically recount this background, as we hold above, when our nation's judicial history already documents unconstitutional discrimination against the class at issue, there is no need for Congress, separately and redundantly, to provide detailed findings of such discrimination in order to exercise its Fourteenth Amendment powers. *See Garrett,* 531 U.S. at 375-76 (Kennedy, J., concurring) ("If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations.").[27]

(ii) A Remedy Needed

As late as 1961, the Supreme Court upheld a gender classification because "woman is still regarded as the center of home and family life." *Hoyt v. Florida,* 368 U.S. 57, 62 (1961). Only in 1971 did the Court find for the first time that

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[26] For other similar statements, *see, e.g., Buchanan,* 29 Wash. at 610, 70 P. 52; *Withey,* 128 N.W. at 917; *Ex parte Miller,* 162 Cal. at 695, 124 P. 427; *Stettler,* 139 P. at 748; *J.B. v. A.B.,* 242 S.E.2d 248, 252 (W.Va. 1978); *Hunter,* 300 P.2d at 458.

[27] We have held that, because gender discrimination is subject to heightened scrutiny, "the burden is on the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct." Part III.A.3.c, *supra,* at 24. Regardless of the burden of proof, however, abundant evidence of unconstitutional state discrimination on the basis of sex exists.

a state law violated the Equal Protection Clause because it arbitrarily discriminated on the basis of sex. *See Reed v. Reed,* 404 U.S. 71 (1971). By this time, Congress had already enacted the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 to prohibit gender discrimination in the workplace. 29 U.S.C. § 206(d); 42 U.S.C. § 2000e, *et seq.* In 1978, Congress amended Title VII to include the Pregnancy Discrimination Act, which barred discrimination on the basis of pregnancy. 42 U.S.C. § 2000e(k).

As we have seen, the Court soon settled on a heightened standard of review for state-imposed gender classifications, requiring "an exceedingly persuasive justification" that is "substantially related" to "important governmental objectives" to validate classifications. *Virginia,* 518 U.S. at 533 (citing *Miss. Univ. for Women,* 458 U.S. at 724, and *Wengler,* 446 U.S. at 150; *see also Kirchberg v. Feenstra,* 450 U.S. 455, 461 (1981). Under heightened scrutiny, "[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" *Virginia,* 518 U.S. at 541 (quoting *Miss. Univ. for Women,* 458 U.S. at 725; *see also id.* at 532 (the Constitution mandates for all citizens, regardless of gender, an "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.").

Heightened constitutional scrutiny and federal laws prohibiting gender discrimination in the workplace could not, however, erase the "volumes of history" of sex discrimination in this country. *Id.* at 531. State support for stereotypical gender roles had allowed American employers—including the states—to develop and function without accommodating workers' home responsibilities during emergencies. Because women filled the caretaking role during times of crisis, men were expected to continue their work without interruption from domestic responsibilities. And, even as women entered the workplace in greater numbers, the continuing expectation

that women would assume responsibility for domestic concerns put a burden on both working women and working men, hindering women's ability to compete equally in the marketplace while making it difficult for men and women to recast family responsibilities by sharing critical responsibilities at home.

Before enacting the FMLA, Congress heard testimony that

> our social structures, and most particularly our employment policies, continue to operate as if women's role is to stay home and care for the family and men's role is to work outside the home for a pay check. . . . [W]e have not accommodated our institutions to the simple reality that men and women no longer operate in separate spheres, but rather that all employees, male and female, have family as well as employment responsibilities. Such accommodation is necessary if workers, and especially women workers, are to be able to exercise their right to equal employment and at the same time to preserve their family lives.

The Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the Comm. on Education and Labor, 100th Cong. (1987) (statement of Donna Lenhoff, Associate Director, Women's Legal Defense Fund). The FMLA preamble and legislative history quite explicitly reflect this same understanding of the historical dynamic, and an intent to change it: Congress specifically found that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." § 2601(a)(5); *see also* H.R. Rep. No. 103-8(I), at 16-17 (1993) ("The typical worker is no longer a man supporting a wife who stays at home, with the woman caring for the children and tending to other family needs . . . . Yet our workplaces are

still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities."); S. Rep. No. 102-68, at 37 (1991) ("In the absence of a family leave standard, childbirth and the need to care for a sick child or parent have an adverse impact on women's earnings.").[28]

The FMLA's legislative history documents statistically the harmful and extant effects of stereotypical gender roles on women's participation in the workplace immediately prior to the Act's enactment. The evidence revealed that women still bore the brunt of domestic responsibilities in American society, and that this burden hindered women's participation in the paid workforce.

Specifically, Congress found that "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women, the most common caregiver being a child or spouse." H.R. Rep. No. 103-8(I), at 24 (1993); S. Rep. No. 103-3, at 7, *reprinted in* 1993 U.S.C.C.A.N. at 9. The "cost of elder care is estimated at $4.8 billion annually in lost income (*mostly to women*) . . . ." S. Rep. No. 102-68, at 28 (1991) (emphasis added). (1993). A 1990 study "concluded that 'caring for elderly parents forces large numbers of women in the labor force to cut their hours, take time off without pay, and rearrange job schedules.'

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[28] In a similar vein, some members of Congress noted that:

> the traditional family where the father is present as breadwinner and mother stays at home, is no longer the norm . . . . While women are no longer at home to be the primary caregivers to sick children, spouses, or elderly parents, family responsibilities have not diminished. . . . But those who must meet their family responsibilities are often faced with the necessity of making a living and being a caregiver.

H.R. Rep. No. 103-8(I), at 86 (1993) (additional views of Representatives Roukema and Molinari); *see also* H.R. Rep. No. 103-8(II), at 86 (1993) (Supplemental Views of Constance A. Morella) (stating that women "continue to be the primary caregivers of children, elderly parents and relatives.").

Indeed the study estimated that *11 to 13% of women caring for elderly parents actually quit their jobs to provide care.*" H.R. Rep. No. 102-135(I), at 20 (1991) (emphasis added).

Further, the record before Congress indicated that most state employers had not developed family leave policies concomitant with those provided for in the FMLA. H.R. Rep. No. 103-8(I), at 78-83 (1993) (Minority Views Attachment B (information provided by Dep't of Labor)). When the FMLA was enacted, many states had enacted no family or medical leave law applicable to state or private sector employees, and many more had either no provisions regarding family care leave for state employees or provided family leave care for state employees so limited that, as a practical matter, employees lacked job security if a relative needed care for a prolonged illness. *Id.* Congress also recognized that if a government employer does not follow a uniform leave policy, discretionary treatment can lead to unequal treatment of employees (especially, for instance, in the granting of parental leave), H.R. Rep. 103-8(II), at 10-11 (1993), perpetuating stereotypical gender roles.

(iii) The FMLA Remedy and the Historical Record

The FMLA preamble declares:

It is the purpose of this Act—

. . . . .

(4) to[,] . . . consistent with the Equal Protection Clause of the Fourteenth Amendment, minimize[ ] the potential for employment discrimination on the basis of sex by ensuring that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection Clause of the Fourteenth Amendment].

§ 2601(b).

Section 2612(a)(1)(C) of the FMLA, providing for unpaid leave to care for an immediate family member of the employee, serves Congress' general "goal of equal employment opportunity for women and men" in several ways:

First, emergencies do arise that require the care of a family member. By providing for a period of job-protected unpaid leave, the FMLA allows women to participate in the public sphere despite the occasional and temporary, but pressing, needs of family members—and despite the inherited assumption of many employers, derived in part from a history of state-sponsored stereotypical gender roles, that workers have another (female) family member to handle emergencies at home.

Second, by allowing both male and female employees reasonable emergency family leave, the FMLA "permits families to choose which parent or sibling will attend to extraordinary family responsibilities in light of the family's preferences, needs, career concerns, and economic considerations." H.R. Rep. No. 103-8(I), at 36 (1993). Under federal policy, then, domestic duties no longer belong to women only, but can be assumed by any adult family member. By allowing either women or men to take responsibility for pressing domestic concerns, according to the family's preferences, the FMLA provides women the opportunity to participate fully in the marketplace. This flexibility offers women (and men) the opportunity to overcome the stereotypical gender roles fostered and perpetuated by the states.

Third, as already discussed, by providing for family-care leave on a *gender neutral* basis, Congress also counteracted any tendency by employers either to refuse to hire women because of their presumed higher need for family-care leave, or to "afford such leave to women but not to men, thus reinforcing gender roles." *Laro,* 259 F.3d at 12;[29] *see* H.R. Rep. No. 103-8(I), at 29 (1993) ("A law providing special protection to women . . . in addition to being inequitable, runs the risk of causing discriminatory treatment. [This legislation], by addressing the needs of all workers, avoids such a risk.")

Additionally, the heightened scrutiny of gender-based classifications would almost surely have precluded leave-protection that was *not* gender neutral. *Cf. Wiesenfeld,* 420 U.S. at 643, 645; *Virginia,* 518 U.S. at 533. It is for this reason, presumably, that Congress in the preamble to the FMLA specified the need to accomplish the purposes of the Act "in a manner . . . consistent with the Equal Protection Clause of the Fourteenth Amendment." § 2601(b)(4).

(iv) Congruence and Proportionality

The FMLA takes a modest step towards eliminating the negative impact of, and discrimination based upon, the stereotypical gender roles that have restricted women's

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[29] *Laro*, while holding that Congress could not validly enact under section 5 of the Fourteenth Amendment the provision of the FMLA relating to the worker's own health conditions (§ 2612(a)(1)(D)), stated that "the constitutional arguments in support of the remaining provisions have greater strength . . . (for instance, their implications for family roles)." *Laro*, 259 F.3d at 9 n.6; *see also id.* at 12 (stating that the arguments supporting the constitutionality of the family leave provisions, based on the proposition that "Congress might reasonably seek to break the cycle of stereotyping and discrimination by requiring gender-neutral leave policies for family care," "may all be true.").

We do not mean here to state any view with regard to the personal disability provision of the FMLA.

opportunities in the workplace. The FMLA, once again, requires only that an employee receive an optional 12-week-maximum, *unpaid,* equivalent-job- guaranteed leave, without loss of benefits, if he or she, or another immediate family member, suffers a serious health condition or if a child is born to or adopted by the employee. §§ 2612(a), 2614(a).[30]

The FMLA, of course, does not simply prohibit employment discrimination on the basis of sex or pregnancy—Congress had already prohibited such discrimination in Title VII and the Pregnancy Discrimination Act. And Congress may not use its section 5 powers to redefine the substantive rights guaranteed by the Fourteenth Amendment. *City of Boerne,* 521 U.S. at 519 ("Congress does not enforce a constitutional right by changing what the right is."). But remedial legislation under section 5 of the Fourteenth Amendment, we reiterate, may reach state conduct that would survive constitutional scrutiny under the Amendment. *See Kimel,* 528 U.S. at 81 ("Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."); *see also City of Boerne,* 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and

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[30] The FMLA does not apply if an employee has not worked for the employer for at least 12 months and for at least 1,250 hours during the previous twelve-month period. § 2611(2). If the need for leave is foreseeable, the employee must give the employer at least 30 days notice if practicable. § 2612(e). The employer may request certification and a second opinion regarding the need for leave. § 2613. Other limitations in the Act will be discussed as relevant below.

intrudes into 'legislative spheres of autonomy previously reserved to the States.'" (quoting *Fitzpatrick v. Bitzer,* 427 U.S. 445, 455 (1976))).

As recounted above, in enacting the FMLA, Congress appropriately sought to counteract the various problems for gender equality in public and private workplaces created by workplace policies that reflect traditional, formerly state-supported assumptions about gender roles in the domestic and public spheres. Additionally, Congress sought to deter future intentional discrimination against women based on those same stereotypes.

There is, as we have seen, ample precedent, consistent with the Supreme Court's recent section 5 jurisprudence, for such "reasonably prophylactic legislation" to remedy "difficult and intractable" problems. *Kimel,* 528 U.S. at 88; *Virginia,* 518 U.S. at 547 ("A proper remedy for an unconstitutional exclusion . . . aims 'to eliminate [so far as possible] the discriminatory effects of the past . . . .'" (quoting *Louisiana v. United States,* 380 U.S. 145, 154 (1965))). Most relevant here, carefully crafted legislation that recognizes and seeks to cure the continuing negative impact of pervasive past *unconstitutional* state discrimination therefore can come within Congress' section 5 authority. *South Carolina v. Katzenbach,* 383 U.S. 301, 334 (1966) ("Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would *freeze the effect of past discrimination* in favor of unqualified white registrants." (emphasis added)); *see also Lopez v. Monterey County,* 525 U.S. 266, 283 (1999) (Congress "may guard against both discriminatory animus and the potentially harmful *effect* of neutral laws . . . ." (emphasis in original)); *City of Rome v. United States,* 446 U.S. 156, 176 (1980) (Congress may, under the authority of section 2 of the Fifteenth Amendment, prohibit state action that . . . perpetuates the effects of past discrimination.); *id.* (construing the various opinions in *Oregon v. Mitchell,* 400 U.S. 112 (1970), as

similarly permitting legislation that "attack[s] the perpetuation of earlier, purposeful racial discrimination"); *cf. City of Boerne,* 521 U.S. at 528 (noting that the voting rights provision requiring New York to permit most Puerto Ricans to vote despite inability to read English, upheld in *Katzenbach v. Morgan,* 384 U.S. 641 (1966), "could be justified as a remedial measure to deal with 'discrimination in governmental services,'" because that rationale "rested on unconstitutional discrimination by New York and Congress' reasonable attempt to combat it.").[31]

As to the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *Garrett,* 121 S. Ct. at 963 (quoting *City of Boerne,* 521 U.S. at 520), congruence and proportionality of remedial legislation "must be judged with reference to the historical experience it reflects." *City of Boerne,* 521 U.S. at 525 (alterations in original omitted). Thus, we must view the FMLA against the continuing impact of nearly two centuries of systemic state sex discrimination in employment and related laws. In light of this "historical experience," the FMLA congruently and proportionately remedies the contemporary impact of such constitutional violations.

First, the targeted FMLA provision here at issue focuses only on one type of policy of public and private employers, one that quite directly reflects the interaction between workplace and domestic duties at the core of the unconstitutional state legislation summarized above. The prior state legislation sought to police a gender-specific division of labor, separating the domestic, female sphere from the workplace,

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[31] The Court in *Garrett* found the ADA beyond Congress' section 5 power in part because the Act prohibited state activity that disparately impacted the disabled. *See Garrett,* 121 S. Ct. at 967. The disparate impact in *Garrett* did not, however, as here, constitute the continuing effects of past intentional and unconstitutional state discrimination, a proper focus of Congress' remedial legislation as shown by the cases above.

male realm. The limited FMLA protection of family care leave seeks to counteract that historical division in all the interrelated ways already discussed.

Moreover, although the history of unconstitutional state legislation recounted above was directed against the workplace participation of women, Congress had excellent reasons, noted in the statute's Findings and Purposes and in its legislative history, for choosing a gender-neutral solution to the problem of inequality in the workplace thus fostered. For one thing, the Constitution almost surely so requires. For another, the same gender stereotyping that underlay the legislation limiting women's workplace options also limited the options of men who wished to participate more fully in their family's domestic lives than traditionally had been the case. Third, protecting the leave rights of women only would have the perverse effect of both reinforcing the traditional stereotypes generally and, more specifically, fostering subtle discrimination against the hiring of women because of their protected right to leave. *See* § 2601(a)(6) ("employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender"). So one more targeted option for remedying past state discrimination against women in employment—that of assuring family care leave for women alone—was simply not viable.

Additionally, the FMLA's intrusion into a state employer's policy options is narrow: The FMLA impacts only the states' public employee leave plans, and does so in a limited way. The statute addresses only the policies of larger employing entities. Further, the statute protects job security, not wage continuation. As such, the FMLA is *not* principally concerned with providing an economic benefit. Instead, the statute is directed at assuring the ability of women to participate in the workforce despite their still-greater role in caring for ill

relatives, and of men to take on domestic responsibilities without foregoing their employment.

In addition, the FMLA does not require job security for the employer's most highly paid (top 10%) salaried employees if restoration would cause "substantial and grievous economic injury." § 2614(b). And the Act sidesteps the political arena by expressly excluding states' elected officials, their staffs, and appointed policy makers from its coverage. § 2611(3) (adopting the definition of "employee" used in the FLSA, 29 U.S.C. § 203(e)).

Finally, although the FMLA does not include a time limitation for its requirements, the Act did establish a Commission to study the impact of the legislation and to report to Congress concerning any appropriate statutory modifications, 29 U.S.C. §§ 2631, 2632, which the Commission did. Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* (1996).

Thus, as a remedy for the current impact of the long history of state-enforced discrimination against women in employment, the FMLA is appropriately classified with the Voting Rights Act, upheld in *South Carolina*, 383 U.S. at 315, and its progeny. Like that Act, the FMLA family leave provisions "affected a discrete class of state laws." In contrast, the "[s]weeping coverage" of the Religious Freedom Restoration Act, struck down in *City of Boerne*, 521 U.S. at 532, intruded "at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." As well-targeted legislation designed to remedy the long history of state-supported treatment of women as marginal workers, the requirement that states in their own employment practices assure that the traditional stereotypes are no longer hampering women's workplace participation is a modest one indeed.

In short, by ensuring that an employee can attend to the most important of family duties but still retain his or her job (or its equivalent), the FMLA remedies to some extent the skewed labor market that had developed in reliance on state-sponsored gender roles. As such, the FMLA family care provisions respond in a congruent manner to a *specific* sort of pervasive unconstitutional state action, of the kind missing in the Supreme Court's recent Fourteenth Amendment section 5 cases. The statute also enacted modest provisions, proportional in their sweep to Congress' important goal of counteracting the impact of stereotypes regarding the family and workplace roles of men and women fostered by unconstitutional state legislation. For these reasons as well as those already discussed, we conclude that Congress acted within its authority under section 5 of the Fourteenth Amendment in enacting the family care provisions of the FMLA.

B. *Ex Parte Young*

Even if Hibbs' suit against the Nevada Department of Human Resources were barred by the Eleventh Amendment, he might still be able to maintain his FMLA suit for prospective injunctive relief against Crawford and Firpo in their official capacities, under *Ex parte Young*, 209 U.S. 123 (1908). Hibbs' opening brief, liberally construed, raises this argument. Hibbs presented the argument to the district court, but the district court did not expressly address it. Defendants do not address the argument in their answering briefs.

Under *Ex parte Young*, private individuals can sue state officers in their official capacities to obtain prospective injunctive relief from the officers' violation of federal law. *See id.* at 159-60. Reinstatement is one of the remedies that Hibbs seeks, and reinstatement is the sort of prospective injunctive relief for which a state officer can be held liable. *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839-42 (9th Cir. 1997).

However, Hibbs can maintain his suit under the FMLA against Crawford and Firpo only if the FMLA gives him a right of action against them. The FMLA grants employees a right of action "against any employer" for violations of the act, 29 U.S.C. § 2617(a)(2), and Hibbs was employed by the Department of Human Resources, not by Crawford or Firpo. However, the statute defines "employer" as including "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." *Id.* § 2611(4)(A)(ii)(I). There is no Ninth Circuit case law on the issue of whether a supervisory employee of a state agency who is sued in her official capacity is an "employer" within the meaning of § 2611(4)(A)(ii)(I), but there is some relevant case law from other circuits. Those cases indicate that whether a supervisory employee counts as an employer for purposes of the statute depends on a number of factors, such as the degree of authority and control over subordinates that the supervisor exercises. *See Wascura v. Carver*, 169 F.3d 683, 685-87 (11th Cir. 1999) (discussing § 2611(4)(A)(ii)(I) and drawing on case law that interprets identical language in the FLSA); *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995) (interpreting the identical language in the FLSA); *Riordan v. Kempiners*, 831 F.2d 690, 694-95 (7th Cir. 1987) (same). While we agree with the other circuits that some supervisory employees can be sued as employers under the FMLA, determining which supervisors qualify is not a straightforward matter, and it has not been briefed by the parties, despite an opportunity for supplemental briefing on the applicability of *Ex parte Young* to Hibbs's case. The parties have not, for example, cited to record evidence or presented arguments concerning the extent of Crawford's or Firpo's supervisory authority over Welfare Division employees in the position formerly held by Hibbs. *See Welch*, 57 F.3d at 1011.

We therefore cannot grant relief to Hibbs on the basis of his *Ex parte Young* argument, because he has failed to develop the record and his argument sufficiently to render it capable of

assessment by this court. *Cf. United States v. Viramontes-Alvarado,* 149 F.3d 912, 916 n.2 (9th Cir. 1998) ("[S]ince this matter was not specifically and distinctly argued in [appellant's] opening brief we need not consider it.").[32]

C. Procedural Due Process

Hibbs argues that his termination violated his procedural due process rights under the Fourteenth Amendment. He contends that because his employment with the Welfare Division was terminable only for cause, he had a property interest in the continuation of that employment. He then argues that he was deprived of that property without due process of law because: (1) The Welfare Division allegedly violated various federal regulations by not notifying him that his unpaid and paid leave ran concurrently; (2) He was fired in retaliation for questioning the Welfare Division's interpretation of the FMLA; and (3) He did not receive "proper notice and an opportunity to be heard" on his interpretation of the FMLA. Defendants do not dispute Hibbs' claim that his employment was terminable only for cause and that it is therefore a cognizable property interest, but they argue that he received all the process that was due to him under the Constitution.[33]

Hibbs' brief cites no evidence in support of his retaliation claim, so that claim cannot serve as a basis for reversal. Hibbs also fails to explain how a due process claim can be based on

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[32] Our declining to decide the merits of the *Ex Parte Young* issue is based on this record (or the lack of it) and is not meant to foreclose further development of the record on remand. *See Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 702 (9th Cir. 1992).

[33] Defendants also argue that Hibbs' substantive due process rights were not violated. Hibbs' brief contains no arguments concerning substantive due process. Consequently, insofar as Hibbs presented a substantive due process claim to the district court, any arguments in support of that claim have now been waived. *Viramontes-Alvarado,* 149 F.3d at 916 n.2.

an allegation of a mere violation of federal regulations—the regulations might well provide for more process than the Constitution requires, and Hibbs has not argued that they do not. Consequently, Hibbs' only viable due process claim is based on his allegation that he did not receive adequate pretermination notice and an opportunity to be heard.

Under *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985), a public employee terminable only for cause is entitled to "notice and an opportunity to respond." *Id.* at 546*; see also id.* ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."); *Gilbert v. Homar,* 520 U.S. 924, 929 (1997) ("[A] public employee dismissable only for cause [is] entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing.").[34]

Hibbs received a written "Specificity of Charges" that documented and described in detail the charges against him, namely, his continued absence from work without leave and his refusal to comply with or respond to orders to return. The document also informed him that the recommended disciplinary action was dismissal, and it notified him of his already-scheduled predisciplinary hearing. According to the hearing officer's report, Hibbs appeared at the hearing, told his side of the story, and, when asked at the close of the hearing whether he had anything more to say, replied that he did not.

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[34] Hibbs' only argument regarding post-termination procedures consists of the following sentence: "The adequacy of the denial of the post hearing altogether based upon a tight time schedule and the circumstances of Appellant's requirement to attend to his spouse in a critical situation was never heard." To the extent that this amounts to an argument that the ten-working-day deadline for filing an appeal of his dismissal violated Hibbs' right to procedural due process, the argument is too undeveloped to be capable of assessment. Hibbs has not argued that the deadline is too short to be met; he has not even explained why he failed to meet it.

Hibbs has not cited any evidence that contradicts the hearing officer's account.

Because they gave Hibbs clear notice and a full opportunity to be heard, the procedures followed by the Welfare Division amply satisfy the due process requirements spelled out in *Loudermill* and *Gilbert*. We therefore find no error in the district court's grant of summary judgment against Hibbs on his procedural due process claim.

IV. CONCLUSION

The district court erred both in concluding that congressional intent to abrogate state sovereign immunity is not sufficiently clear and in holding that Congress did not validly exercise its section 5 power when it gave state employees the right to sue their employers for violations of § 2612(a)(1)(C). Accordingly, the district court's grant of Defendants' motion for summary judgment on the FMLA claim is reversed. Because the district court's dismissal of Hibbs' state-law claims was dependent on its dismissal of the federal claims, we vacate the dismissal of the state-law claims as well, and remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

NOT FOR PUBLICATION

UNITED STATES COURT
OF APPEALS
FOR THE NINTH CIRCUIT

William HIBBS, Plaintiff-Appellant,
UNITED STATES OF AMERICA, Intervenor,
v.
DEPARTMENT OF HUMAN RESOURCES;
Charlotte CRAWFORD; Nikki FIRPO,
Defendants-Appellees.

No. 99-16321
DC No. CV 98-205 HDM

ORDER

Filed, Jan. 8, 2002

Before: TASHIMA, Circuit Judge.

Pursuant to the motion of defendants-appellees, issuance of the mandate is stayed pending the filing of a petition for a writ of certiorari in the Supreme Court. The stay is granted pursuant to Fed. R. App. P. 41(d)(2), and is subject to the limitations of Fed. R. App. P. 41(d)(2)(B).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

William HIBBS, Plaintiff,

-vs-

THE DEPARTMENT OF HUMAN RESOURCES, state of Nevada, Charlotte Crawford, in her official capacity as the Director of the Human Resources Division of the state of Nevada et al., Defendants.

NO. CV-N-98-205-HDM(PHA)

United States District Court
400 South Virginia Street
Reno, Nevada 89501
June 3, 1999

TRANSCRIPT OF MOTION NUMBERS 54 AND 55
BEFORE THE HONORABLE HOWARD D. McKIBBEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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Treva J. Hearne
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FOR THE DEFENDANT:

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Proceedings recorded by mechanical stenography produced by computer-aided transcript

OFFICIAL COURT REPORTER:
KATHRYN M. FRENCH, RPR
NEVADA LICENSE NO. 392
CALIFORNIA LICENSE NO. 8536

* * *

COURT'S RULING

THE COURT: I've considered the arguments of counsel. There are two federal claims that are before the Court, and I will address them in the motion for summary judgment filed by the defendants. The motion for partial summary judgment, in effect, tracks a good portion of what is discussed in the motion for summary judgment, as has been reviewed by the Court here today.

I'll first address the question involving the waiver of sovereign immunity under the Eleventh Amendment. That's, obviously, an important issue in connection with this case.

The plaintiff has filed not only an a action under the FMLA, the federal act, but also under the State act. The Court's determination with respect to whether or not there has or hasn't been an abrogation of sovereign immunity under the Eleventh Amendment by virtue of language of the Act, will not preclude the plaintiff from proceeding in connection with the State provisions, as the State has enacted an act which permits recourse, if the plaintiff has recourse under that Act — which is something that wasn't available in a number of the federal district proceedings where the district court concluded that the provisions of the Act, the FMLA, did not show an intent to abrogate immunity under the Eleventh Amendment.

In any event, let me address where we are as far as Nevada is concerned, and as far as the Act is concerned on the question of sovereign immunity.

NRS 41.031, which is the State law that deals with the issue of waiver of immunity from liability and actions, makes it very clear that Nevada has not waived its sovereign immunity, and has done so only in very limited circumstances, which do not apply here, and which are not relevant here. Therefore, I think there's little question—and the parties do not seriously argue, I think, that Nevada itself has waived its sovereign immunity. It has maintained its sovereign immunity, except in limited circumstances not applicable here.

So, the question, then, really turns on whether or not the factors under *Seminal Tribe* have been met. In *Seminal Tribe of Florida versus Florida*, which is 517 United States, 44; 116 Supreme Court 1114, a 1996 decision, the Supreme Court held that:

"In determining whether Congress has successfully abrogated a state sovereign immunity, two factors have to be considered:

"First, whether Congress provided a clear legislative statement of its intent to abrogate immunity; and

"Second, whether Congress acted under proper constitutional authority."

So let's take a look, first, at the factor whether or not Congress provided a clear legislative statement of its intent to abrogate immunity.

And I start off by indicating that Congress knows precisely how to expressly abrogate Eleventh Amendment immunity. In fact, it has done so in connection with other matters.

In the ADA legislation, the enactment of Congress states: "That a state shall not be immuned under the Eleventh Amendment." That's 42 USC Section 12202.

There's no question that Congress knows, specifically, how to abrogate immunity under the Eleventh Amendment. It has done so. It has done so clearly. It can do so clearly, when it wishes to do so.

The courts struggle in these areas when Congress is unclear on, perhaps, what its intent is. I think it's clear, also, that the Supreme Court in the case of *Dellmuth*, which is D-e-l-l-m-u-t-h, 491 U.S. at 228, and 109 Supreme Court at 2397, has indicated that legislative history; that is, an examination and review and consideration of legislative history is unnecessary. You look to the text of the statute in considering whether or not there has been a clear intent on the part of the Congress to abrogate. And so that's what we must do here.

If we look at the provisions of the FMLA, we see that it provides for suits against any employer, including a public agency in any federal or state court of competent jurisdiction. And that's section 2617(a) (2) of the Act.

In section 26114(a) (ii), the FMLA defines employers as including any public agency as defined under section 203(x) of the title. 203(x) defines Fair Labor Standards Act, the definition section of the Fair Labor Standards Act, and defines public agency as the government of a state or political subdivision thereof, any agency of a state or a political subdivision of a state.

The inclusion of states and their agencies within the definition of employer, does not provide the necessary clear statement of intent to allow suits against states by private citizens in federal courts. And that's set forth in the *Kimmel (phonetic)* decision, which is 139 F.3d at 1432.

The Supreme Court has also indicated that merely including states in the definition of employer, does not provide unequivocal language needed to abrogate immunity. And I would cite you to the *Employees of the Department of Public Health and Welfare, and Department of Public Health and*

Welfare of Missouri, 411 U.S. 279 at 281. There, the Supreme Court held that the amendment to the FMLA, which included states in the definition of employer, did not provide an unequivocal definition of abrogation.

The enforcement section provides that an action may be maintained against any employer, including a public agency, in any federal or state court of competent jurisdiction.

Now, these sections establish that FMLA suits may be brought in federal court. I think it is also clear that a general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. The Supreme Court specifically held that in *Seminal* at page 54, 517 U.S. at 54.

And as I indicate, there is absolutely nothing in any of the sections of the legislation that mention Eleventh Amendment immunity. There is certainly nothing in there that comes close to setting forth the necessary language for abrogation, as you find under the ADA, for example, which I have previously cited under section 12202 of Title 42 of United States Code, where Congress said a state shall not be immuned under the Eleventh Amendment.

For these reasons, the Court concludes that Congress has not clearly expressed an intent to abrogate immunity in the FMLA. And, therefore, the plaintiff's claim under the FMLA is barred by the Eleventh Amendment.

Now, I also, just briefly, will address whether or not, if the Court had concluded otherwise on that first prong of *Seminal*, why I conclude with respect to the second prong, that the test under *Seminal* has not been met.

Congress also must act within its constitutional authority in order to abrogate sovereign immunity. And it can only abrogate immunity, if it enacts legislation pursuant to its authority under section 5 of the Fourteenth Amendment of the United States Constitution.

And as has been set forth in *Catzenbach versus Morgan*, 384 U.S. 641 at 651, a 1966 decision, a statute is properly enacted under the provisions of section 5 of the Fourteenth Amendment if, one, it may be regarded as an enactment to enforce the equal protection clause;

Second, it is plainly adapted to that end; and

Third, it is not prohibited by, but is consistent with the letter and spirit of the Constitution.

Now, the statute has to indicate that it is being passed to enforce Fourteenth Amendment rights.

Here, section 4 of the FMLA, and that's section 2601(b) subsection 4, states that entitlement to leave is provided in a manner that is consistent with the equal protection clause of the Fourteenth Amendment; minimizes the potential for employment discrimination on the basis of sex, by ensuring, generally, that leave is available for eligible medical reasons, or a general neutral basis, and to promote the goal of equal employment opportunity for women and men pursuant to the clause. And that's subsection 5.

It would appear on the face of the provisions of the Act, therefore, that it at least has met that prong. And that is, that on its face, the FMLA is designed to enforce the provisions of the equal protection clause.

With respect to the second part of the test, as set forth under the *Catzenbach* analysis; whether it is plainly adapted to that end, to meet Congress' purposes under the Fourth Amendment, the Court looks to the case of *City of Bourne versus Florez*, 521 United States 507; 117 Supreme Court 2157, 1997 decision. There, the court held that in order to guard against legislation that is substantive rather than remedial in nature, there must be a congruence in proportionality between the injury to be prevented or remedied, and the means to that end. And that's found, as I

say, in *City of Bourne*, which is found at page 2170, which is 117 Supreme Court, 2170.

And if you go through the provisions of the FMLA, it's clear that it provides for time off from work for medical reasons; for reasons involving the relationship of parent and child; that is, in adoptions and births; to take care of those who are sick in the family—precisely the type of thing that we have here with the plaintiff. And Congress sought, also, to prevent employers from discriminating against employees, primarily female employees, who request leave of absence to perform certain functions that they would perform in connection with child care and other matters.

And in addition to promoting and preserving the family integrity, and promoting the goal of equal employment opportunity, the regulation, because it has the limitation period; that is, that it provides for entitlement to twelve weeks of leave, for the reasons set forth in the statute, also has an economic purpose, as well as an equal protection purpose.

In order to satisfy the tests under *Florez*, and under *Catzenbach*, as I have set forth earlier, the FMLA, must be plainly adapted or congruent and proportional to the purpose of preventing gender discrimination. And the Court concludes that—as have a number of district courts that have been cited here which have fully addressed this issue, post-Seminal case and the *Catzenbach versus Morgan* analysis, that the FMLA mandates that not only are employers required to treat leave requests the same for both men and women, but they're required to provide, what I would construe to be, a valuable, economic benefit, which is the twelve weeks of leave. And the Court concludes that this is substantive legislation that exceeds the power of Congress, and the scope of Congress' authority under section 5.

Where an employee is denied leave solely because of gender, then that discrimination may be actionable under other

provisions of the federal law, which would be Title Seven, and may also be actionable under other portions of the law.

If the employer somehow, and if it's a state, and the employee brings an action against state officials for violation of rights under the equal protection provisions, then those may be addressed in appropriate actions under 42 USC Section 1983.

Because of the, what I perceive to be an extremely valuable economic benefit that is derived by virtue of the terms of the Act; that is, the twelve-week leave, and as is consistent with the findings of a number of district court decisions that have come down on this more recently, which I think are well reasoned on this point, the legislation exceeded the enforcement powers under section 5 of the Fourteenth Amendment. And for those reasons, the Court concludes that, first, Congress has not abrogated the State's Eleventh Amendment immunity and, therefore, the first prong under *Seminal* has not been met.

With respect to the second prong; whether Congress has acted pursuant to a valid exercise of power, for the reasons that I have set forth, applying the *Catzenbach* analysis, the prongs that I have set forth here that have not been met, cause the legislation to fail the second prong of the *Seminal* test; that is, whether Congress acted pursuant to the valid exercise of power under the circumstances of the application of FMLA here.

What, of course, is somewhat different in this case than in some others, is the fact that the State has enacted a comparable provision, so the plaintiff is not left without a remedy, based upon the Court's findings, that the FMLA, as enacted by Congress, did not abrogate the Eleventh Amendment immunity.

Now, the fact that the State has enacted such an act can cut both ways. It can perhaps be argued, as the plaintiff attempts

to here, that by doing that, then the State itself acknowledges an abrogation of the Eleventh Amendment. I don't believe that that argument, or that conclusion necessarily follows.

It is certainly as reasonable to conclude that the State enacted it to ensure that people within the State also would have valuable rights provided to them. The State determining, as a legislative matter, and as a policy matter, that that was important from the State's standpoint. And that does not leave the plaintiff—as it has in some of these other district court cases, which is somewhat troubling to this court—without a remedy. And the Court's conclusion here is in no way to be construed as therefore determining that the plaintiff is without a remedy.

Having made this conclusion, and, further, the Court concluding that there has not been a violation of the Fourteenth Amendment; that is, that there was a pre-termination hearing that complied with the due process provisions of the Fourteenth Amendment, and the opportunity for a post-termination hearing, had the plaintiff availed himself of that, that there has not been a violation of the Fourteenth Amendment to the United States Constitution.

Now, having made these determinations, I am addressing only the federal claims. While the Court has some judgments with respect to whether or not the five months which the plaintiff took off from work exceeded the scope of what was permitted under the FMLA—and there seems to be some fairly compelling documents in the record that would suggest that there was time taken in excess of that permitted under the FMLA—it's unnecessary for the Court to make that determination. Because by virtue of dismissing these federal claims, they are dismissed without prejudice to the plaintiff proceeding in State Court under the State comparable act with respect to the Medical Leave Act, and I think it would be appropriate for that court to make the determination on the factual issues involving the time periods involved, and not to

have this court make that determination because I have determined that I don't have jurisdiction. It's not my practice to suggest, when I indicate that I do not have jurisdiction, it's not my practice to suggest how the Court would or would not have ruled in connection with factual determinations, and whether or not those are issues of material fact that would preclude the plaintiff from going forward on his claim under the State Act; that is, whether or riot the leave was concurrent, whether or not he was properly notified of that. Those are issues that will have to be resolved.

Accordingly, this will constitute findings of fact and conclusions of law of the Court. For the reasons that I've indicated I believe that I do not have jurisdiction and, accordingly, the claim under the FMLA is dismissed.

The claim under the cause of action relating to a violation of the Fourteenth Amendment to the United States Constitution, summary judgment is granted on both of those claims. This is without prejudice to the plaintiff proceeding on the other claims. They are State claims. The Court declines to exercise jurisdiction with respect to the State claims.

The dismissal of this case is without prejudice. The time limits and the statute of limitations was tolled while the matter was here. It's without prejudice to the plaintiff proceeding in State Court on the plaintiff's several State claims, and I do not address the merits of those claims.

This, as I say, will constitute findings and conclusions of the Court. Summary judgment is granted in favor of the defendant and against the plaintiff, for the reasons that I have set forth on the two federal claims. And the case is dismissed because the Court does not exercise supplemental jurisdiction over the State claims. It is dismissed without prejudice so that the plaintiff may proceed in State Court on the State claims. It is so ordered.

Is there anything else, counsel?

MR. HILSABECK: No.

MS. HEARNE: No.

THE COURT: Thank you very much.

MS. HEARNE: Thank you, Your Honor.

(Court adjourned.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/
KATHRYN M. FRENCH, RPR, CCR DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

William HIBBS, Plaintiff,

v

THE DEPARTMENT OF HUMAN RESOURCES, State of Nevada, Charlotte Crawford, in her official capacity as the Director of the Human Resources Division of the State of Nevada et al., Defendants.
CV-N-98-205-HDM (PHA)

MINUTES OF THE COURT
June 3, 1999

PRESENT: HONORABLE HOWARD D. McKIBBEN, CHIEF U.S. DISTRICT JUDGE
Deputy Clerk: Bette Stewart
Reporter/Recorder: Kathryn M. French
Counsel for Plaintiff(s): Treva J. Hearne and Charles R. Zeh
Counsel for Defendant(s):Charles Hilsabeck and Nancy F. Angres

PROCEEDINGS: Hearing on:

Defendants' Motion for Summary Judgment (#55) and Plaintiff's Motion for Partial Summary Judgment (#54)

9:00 a.m. Court convenes:

Arguments are presented on behalf of defendants by Charles Hilsabeck and on behalf of plaintiff by Treva Hearne.

The court sets forth the findings of fact and conclusions of law on the record. Plaintiff's claim under the FMLA is barred by the Eleventh Amendment; the FMLA as enacted by Congress did not abrogate 11th Amendment immunity. The

court finds no violation of plaintiff's rights under the 14th Amendment.

IT IS ORDERED that defendants' Motion for Summary Judgment (#55) is *granted* as to the federal claims. Summary judgment is granted in favor of the defendants and against the plaintiff on the two federal claims (First and Second Claims for Relief).

IT IS FURTHER ORDERED that the state claims (Third through Sixth Claims for Relief) are dismissed without prejudice. The court declines to exercise supplemental jurisdiction. The running of the Statute of Limitations is tolled during the period this action was before the federal court.

[Plaintiff's Motion for Partial Summary Judgment (#54), Plaintiff's Motion for Leave to Amend (#42), Defendants' Motion for Clarification of Order (#47) and Defendants' Motion for Sanctions for Failure to Comply with Order Compelling Discovery (#49) are rendered moot.]

9:50 a.m. Court adjourns.

LANCE S. WILSON, CLERK

By: /s/
Deputy Clerk

OTHER STATUTORY PROVISIONS

29 U.S.C. § 203. Definitions —

As used in this chapter —

* * *

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 2601. Findings and purposes

(a) Findings

Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the

working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2611. Definitions

As used in this subchapter:

***

(4) Employer

(A) In general

The term "employer"—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

***

(iii) includes any "public agency", as defined in section 203(x) of this title;

***

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

29 U.S.C. § 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

29 U.S.C. § 2617(a). Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected—

(A) for damages equal to—

(i) the amount of—

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the

employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

•••

Supreme Court, U.S.
FILED
MAY 20 2002
CLERK

No. 01-1368

In the Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL., PETITIONERS

v.

WILLIAM HIBBS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 29 U.S.C. 2612(a)(1)(C), the family medical care provision of the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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In the Supreme Court of the United States

No. 01-1368

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL., PETITIONERS

v.

WILLIAM HIBBS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 273 F.3d 844. The ruling of the district court (Pet. App. 48a-60a) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 11, 2001. The petition for a writ of certiorari was filed on March 11, 2002. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, "to

promote" the Equal Protection Clause's guarantee "of equal employment opportunity for women and men," 29 U.S.C. 2601(b)(5), in the discharge of competing family care obligations, 29 U.S.C. 2612(a)(1). After eight years of study, Congress found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. 2601(a)(5). Congress further found that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. 2601(a)(6). Congress accordingly determined that, to avoid entrenching and reinforcing those sex roles and their impact on equal employment opportunities, employers must be required to provide family care leave on a sex-neutral basis.

To counteract the effects of past gender discrimination and stereotyping in employment, Congress, in the FMLA, entitled public and private employees "to take reasonable leave * * * for the care of a child, spouse, or parent who has a serious health condition" in "a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for * * * compelling family reasons, on a gender-neutral basis." 29 U.S.C. 2601(b)(2) and (4).

The FMLA's family medical care provision, which is at issue here, entitles eligible employees to take up to twelve workweeks of unpaid leave per year to care for a parent, child, or spouse with a serious health condition. 29 U.S.C. 2612(a)(1)(C). The FMLA applies only to em-

ployees who have worked for the employer for at least one year and who provided at least 1,250 hours of service within the last twelve months. 29 U.S.C. 2611(2)(A). Covered employers include federal and state governments, 29 U.S.C. 2611(4)(A)(iii), 203(x), but the FMLA excludes from eligibility for leave government employees who hold certain high-ranking or sensitive positions, 29 U.S.C. 2611(2)(B)(i) and (3), 203(e)(2)(C). The FMLA requires employees to give advance notice of foreseeable leave, 29 U.S.C. 2612(e), and permits employers to require certification by a health care provider (and second and third opinions) of the need for leave. See 29 U.S.C. 2613.

The FMLA encourages employers to adopt more generous leave policies than its provisions mandate. *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1159, 1160 (2002). To that end, Congress provided that "[n]othing in this Act * * * shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." 29 U.S.C. 2651(b).

The FMLA makes it unlawful for employers to "interfere with, restrain or deny the exercise of" FMLA rights, 29 U.S.C. 2615(a)(1), and prohibits retaliation against any individual for "opposing any practice made unlawful by this subchapter," 29 U.S.C. 2615(a)(2). The FMLA authorizes employees to bring a civil action against employers who violate the Act. 29 U.S.C. 2617(a). The FMLA's provisions also may be enforced by the Secretary of Labor. 29 U.S.C. 2617(b).

2. In April and May 1997, respondent Hibbs sought leave under the FMLA to care for his ailing wife. Pet. App. 2a. Petitioner, the Nevada Department of Human Resources, granted his request for the full twelve

weeks of FMLA leave and authorized him to use the leave intermittently as needed between May and December 1997. *Ibid.* In June and September 1997, the Department granted Hibbs a special benefit available under state law known as "catastrophic leave"—paid leave donated by other employees. *Ibid.*; Pet. 3. According to the court of appeals, the Department informed Hibbs that the catastrophic leave would count against his annual 12-week FMLA leave entitlement. Pet. App. 2a. Hibbs used his leave intermittently until August 5, 1997, after which he did not return to work. *Ibid.*

In October 1997, the Department notified Hibbs that he had exhausted his 12 weeks of leave available under the FMLA. Pet. App. 2a. Although Hibbs requested an additional 200 hours of catastrophic leave, the Department informed him that no further leave would be granted and directed him to report to work by November 12, 1997. *Id.* at 2a-3a. When Hibbs did not report to work on that date or after a second direction to report, the Department recommended that Hibbs be dismissed and scheduled a pre-disciplinary hearing. *Id.* at 3a. At the hearing, Hibbs argued that his FMLA leave should have begun only after his catastrophic leave ended. *Ibid.* The hearing officer recommended dismissal and Hibbs was dismissed, effective December 22, 1997. *Ibid.*

After an unsuccessful administrative appeal, Hibbs filed suit in federal district court under the FMLA against the Department and two officials, who were sued in their official capacities. Pet. App. 3a. Hibbs alleged, in relevant part, that petitioners violated the FMLA by failing to designate his catastrophic leave as FMLA leave, by failing to give him additional leave, and by retaliating against him for taking FMLA leave.

Complaint 8. Petitioners moved for summary judgment on the ground that the Eleventh Amendment barred Hibbs' federal court action under the FMLA. The district court agreed and granted summary judgment for petitioners.

3. Hibbs appealed, and the United States intervened, under 28 U.S.C. 2403, to defend the constitutionality of Congress's abrogation of state sovereign immunity. Pet. App. 4a. The court of appeals reversed. *Id.* at 1a-46a. The court held that the family medical care provision of the FMLA, 29 U.S.C. 2612(a)(1)(C), was validly enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment and, accordingly, that the abrogation of Eleventh Amendment immunity was constitutional. Pet. App. 9a-42a. The court ruled that the FMLA "is expressly aimed at preventing gender discrimination," *id.* at 18a n.9, which is subject to heightened scrutiny under the Constitution due to the pervasive history of gender discrimination in the country. The court accordingly reasoned that the FMLA's family care provision should be analyzed somewhat differently from the provisions at issue in this Court's prior decisions that addressed Congress's Section 5 power to enforce rights subject only to rational basis review. *Id.* at 18a (citing *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) (age discrimination), and *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001) (disability discrimination)). "[T]he kind of history of invidious gender discrimination by states that [the Court] was unable to find, in *Kimel* and *Garrett*, with respect to age and disability," the court explained, requires sustaining the exercise of Section 5 power unless those attacking the constitutionality of the Act demonstrate that the pervasive history of discrimination did not extend to employment

leave practices or to "state enforcement of stereotypical family roles." *Id.* at 18a-19a.

The court further ruled, in the alternative, that the family care provision could be sustained even under the analysis applied to rights subject to rational basis review, because the legislative history "justifies the enactment of the FMLA as a prophylactic measure." Pet. App. 20a. The court cited to "substantial evidence of gender discrimination with respect to the granting of leave to state employees," *ibid.*, and noted that Congress "was acting against a background of state-imposed systemic barriers to women's equality in the workplace that, under recent constitutional doctrine, were undoubtedly unconstitutional." *Id.* at 23a. In upholding such laws, state courts "made clear that the basis, and validity, of such laws lay in stereotypical beliefs about the appropriate roles of men and women." *Id.* at 29a.

The court also held that the remedy that the family care provision of the FMLA provides is congruent and proportional to the gender discrimination that Congress intended to prevent. Pet. App. 36a-42a. The court explained that the family care provision "focuses only on one type of policy of public and private employers, one that quite directly reflects the interaction between workplace and domestic duties at the core of the unconstitutional state legislation" that restricted women's hours and occupations. *Id.* at 39a. The court stressed that the FMLA "impacts only the states' public employee leave plans, and does so in a limited way," because the Act guarantees only unpaid leave and thus "protects job security, not wage continuation." *Id.* at 40a. In short, the court concluded that the family medical care provision of the Act is valid Fourteenth Amendment legislation because it "enact[s] modest pro-

visions, proportional in their sweep to Congress' important goal of counteracting the impact of stereotypes regarding the family and workplace roles of men and women fostered by unconstitutional state legislation." *Id.* at 42a.

Finally, the court ruled that, even if the Eleventh Amendment barred Hibbs' suit against the Department, he might be able to sue the individual petitioners for prospective injunctive relief pursuant to *Ex parte Young*, 209 U.S. 123 (1908), if he could show that the individual petitioners had the requisite supervisory authority to qualify as employers under the Act. Pet. App. 42a-43a.

ARGUMENT

Because the narrow conflict on the question presented by the petition is nascent and because, in any event, there are significant barriers to granting plenary review in this case, the petition should be denied.

1. a. Petitioners argue (Pet. 8-13) that this Court should grant review to resolve a conflict in the circuits over whether the FMLA is valid Section 5 legislation. Petitioners greatly exaggerate the scope of that conflict, however. The only question decided by the court of appeals (Pet. App. 5a-6a) and the only question presented in the petition (Pet. i) is whether the FMLA's *family medical care provision*, 29 U.S.C. 2612(a)(1)(C), is valid Section 5 legislation. While petitioners cite numerous court of appeals decisions (Pet. 10-12) as evidence of a purported conflict, virtually all of those cases involved the FMLA's *individual sick leave provision*, 29 U.S.C. 2612(a)(1)(D).[1] That provision,

[1] See *Montgomery* v. *Maryland*, 266 F.3d 334, 336 (4th Cir. 2001), petition for cert. pending on other grounds, No. 01-1079 (filed Jan. 18, 2002); *Laro* v. *New Hampshire*, 259 F.3d 1, 4 & n.1

which guarantees unpaid leave for an employee's own "serious health condition that makes the employee unable to perform the functions of the position of such employee," is not at issue here.

As the court of appeals explained, "[t]he difference matters." Pet. App. 6a. Prior to this Court's decision in *Board of Trustees of the Univ. of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the government defended the individual sick leave provision primarily as Section 5 legislation aimed at protecting against discrimination on the basis of temporary disability (a classification subject only to rational basis review). This Court's holding in *Garrett* that Title I of the Americans with Disabilities Act, which generally protects against employment discrimination on the basis of long-term or permanent disabilities, is not valid Section 5 legislation essentially foreclosed that line of defense. Indeed, the Solicitor General determined, in the wake of *Garrett*, to take the extraordinary step of abandoning further constitutional defense of the abrogation of Eleventh Amendment immunity for the individual sick leave provision.[2]

(1st Cir. 2001); *Lizzi* v. *Alexander*, 255 F.3d 128, 131 (4th Cir. 2001), cert. denied, 122 S. Ct. 812 (2002); *Townsel* v. *Missouri*, 233 F.3d 1094, 1095 & n.2 (8th Cir. 2000); *Chittister* v. *Department of Cmty. & Econ. Dev.*, 226 F.3d 223, 225 (3d Cir. 2000); *Sims* v. *University of Cincinnati*, 219 F.3d 559, 561 (6th Cir. 2000); *Hale* v. *Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Garrett* v. *University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1219 (11th Cir. 1999), rev'd on other grounds, 531 U.S. 356 (2001); *Schall* v. *Wichita State Univ.*, 7 P.3d 1144, 1149-1151 (Kan. 2000).

[2] We are lodging with the Court copies of letters from the Solicitor General notifying Congress of his decision to decline further defense of the abrogation of Eleventh Amendment immunity for claims brought under 29 U.S.C. 2612(a)(1)(D).

The family care provision at issue here stands on a distinct constitutional footing—it remedies and directly responds to the continuing effects of well-documented, historic gender discrimination in employment and employment policies. Accordingly, the courts of appeals' dispositions of the individual sick leave provision (which does not significantly implicate gender discrimination) suggest little, if anything, about how those courts would resolve the gender discrimination question presented by the family care provision at issue here. A number of courts of appeals have said as much. See *Laro* v. *New Hampshire*, 259 F.3d 1, 9 n.6 (1st Cir. 2001) (expressly limiting holding to individual sick leave provision, because "[t]he constitutional arguments in support of the remaining provisions have greater strength and raise issues (for instance, their implications for family roles) not at stake here"); *Garrett* v. *University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1216, 1220 (11th Cir. 1999) (although "state is immune from suit under the [medical leave provision]," "it might well not be immune from suit under certain other provisions of the Act"), rev'd on other grounds, 531 U.S. 356 (2001); see also *Chittister* v. *Department of Community & Econ. Dev.*, 226 F.3d 223, 225, 229 (3d Cir. 2000) (holding expressly limited to provisions at issue); *Hale* v *Mann*, 216 F.3d 61, 69 (2d Cir. 2000) (same).

Only one circuit, besides the court of appeals here, has established precedent addressing the abrogation of Eleventh Amendment immunity for the FMLA's family medical care provision. In *Kazmier* v. *Widmann*, 225 F.3d 519 (2000), a divided panel of the Fifth Circuit held that the abrogation of Eleventh Amendment immunity was not valid because the family medical care provision

was not appropriate Section 5 legislation.[3] That narrow conflict, however, does not merit this Court's review at this time. In neither *Kazmier* nor the case at hand did the parties seek rehearing en banc —despite the strong dissent by Judge Dennis in *Kazmier*, 225 F.3d at 533-549. In light of the nascency of the circuit conflict, the division within the Fifth Circuit panel, and petitioners' failure to file a petition for rehearing en banc, the courts of appeals still retain the ability to bring the case precedent into harmony and eliminate the conflict by sitting en banc. In addition, the issue is pending in the Eleventh Circuit. See *Bylsma* v. *Davis*, No. 01-16102-A. Resolution of this important constitutional question —going to the heart of Congress's Section 5 power to enforce the rights of individuals long subjected to a well-documented history of unconstitutional discrimination and thus potentially implicating numerous other civil rights statutes—should be undertaken only after

[3] Prior to this Court's decision in *Garrett*, the Sixth Circuit sustained a claim of Eleventh Amendment immunity in a case arising under the family medical care provision in an unpublished decision. See *Thomson* v. *Ohio State Univ. Hosp.*, 238 F.3d 424 (2000) (Table). The *Thomson* court (with the acquiescence of the parties, including the United States) simply applied *Sims'* individual sick leave holding without analysis or discussion of the distinctive legal and empirical questions presented by the record of employment gender discrimination underlying the family care provision. It is the considered position of the United States, however, that, in light of this Court's decision in *Garrett*, the question of Congress's authority to enact the family medical leave provision and the sick leave provision present distinct constitutional questions, the analysis of which should not be intertwined. The *Thomson* decision, in any event, is non-precedential. See 6th Cir. R. 28(g), 206(c). As such, *Thomson* does not reflect the Sixth Circuit's final and binding resolution of the question presented here.

due deliberation and thoroughgoing consideration by the lower courts.

b. Petitioners posit (Pet. 10-13) a disparity in the "standards applied" (Pet. 10) by courts of appeals in Section 5 cases. Petitioners overstate the difference. If the analyses are different, it is because the cases are different. The court of appeals here approached the gender discrimination relevant to the family medical leave provision with a different presumption about the history of discrimination to which Congress responded than have those courts addressing the distinct rational-basis right that underlies the statutory right to sick leave. But the court of appeals did so because this Court's heightened scrutiny and Section 5 cases have recognized that gender discrimination is different. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 533 (1996); see also *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

Indeed, with respect to cases involving gender discrimination, it is not clear that the legal standards applied by the courts diverge in any significant respect. In the one other published court of appeals case to address the family medical care provision, the Fifth Circuit, like the court of appeals here, acknowledged that, because of the heightened scrutiny accorded gender discrimination, "Congress *potentially* has wide latitude under Section 5 to enact broad prophylactic legislation designed to prevent the States from discriminating on the basis of sex." *Kazmier*, 225 F.3d at 526; see *ibid.* (if the family care provision were understood as designed to remedy past discrimination,

"the absence of evidence of constitutional violations might not present a problem").[4]

2. This Court's recent, intervening decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), counsels against using this case as a vehicle to analyze the appropriateness of the family medical care provision as Section 5 legislation. With the exception of a retaliation complaint that the court of appeals did not address and for which petitioners have not sought this Court's review, the complaint (at 8) and the court of appeals' decision (Pet. App. 3a) identify Hibbs' FMLA claim as limited to petitioners' failure (i) to have his FMLA leave run consecutively to his state-law catastrophic leave benefits and (ii) to notify him that the catastrophic leave would serve as his FMLA leave.

In *Ragsdale*, however, this Court made clear that leave taken under an employer's more generous policies (like catastrophic leave) "may be counted toward the 12 weeks guaranteed by the FMLA." 122 S. Ct. at 1160; see *id.* at 1159 ("Ragsdale was entitled to no more leave"); *id.* at 1164 (employees have no right "to more than 12 weeks of FMLA-compliant leave in a given 1-year period"). The Court also held that the remedy for a failure to give notice generally is not the additional leave that Hibbs sought. *Id.* at 1162-1165. Nor has Hibbs alleged in his complaint or shown at this stage that he "would have taken less leave or intermittent leave if []he had received the required notice." *Id.* at

[4] In any event, the court of appeals expressly ruled in the alternative that the family medical care provision satisfied the legal standards laid down for Section 5 legislation enforcing rights subject only to rational-basis review. See Pet. App. 20a. The supposed conflict in analysis thus ultimately did not alter the outcome of this case.

1162. To the contrary, the complaint (at 3) alleges that his wife would require his full time care until surgery in November—which apparently required Hibbs to take leave well in excess of that allotted by the FMLA. See Pet. App. 56a (on summary judgment, district court notes that "there seems to be some fairly compelling documents in the record that would suggest that there was time taken in excess of that permitted under the FMLA").

While the United States takes no position on the ultimate question of whether *Ragsdale* disposes of Hibbs' claim, this Court's intervening precedent casts such significant doubt on the validity of his underlying claim—and, indeed, on whether the complaint even states a legally cognizable claim—that the case is an unsuitable vehicle for resolution of the important constitutional question presented here. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Yet, in light of the apparent weaknesses in Hibbs' underlying claim for relief, the petition asks this Court to "anticipate a question of constitutional law in advance of the necessity of deciding it" *id.* at 346—and, indeed, in the face of precedent from this Court casting palpable doubt on the viability of the underlying claim. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

Petitioners' litigation conduct below reflected that appropriate reluctance to have courts address constitu-

tional issues unnecessarily. Petitioners initially moved the district court to dismiss the case on the ground, *inter alia*, that Hibbs had received all the leave he was entitled to under the FMLA. See Def. Mot. to Dismiss 3-4. Although the Eleventh Amendment was raised in petitioners' answer (at 9), petitioners did not move to dismiss the case on that ground. It was not until nearly a year after the motion to dismiss was filed that petitioners sought, on summary judgment, to have the case dismissed on Eleventh Amendment grounds.

Furthermore, those general rules of constitutional avoidance apply with special force in the context of reviewing Section 5 legislation. See *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 605 (1990) (O'Connor, J., dissenting) (legislation enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment "present[s] special concerns for judicial review"). In particular, application of this Court's "now familiar principles," *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001), for evaluating the propriety of such legislation requires evaluation of the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" by the legislation. *Ibid.* (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). A case in which the application of the FMLA is so questionable (*i.e.*, the complaint may fail to state a cognizable claim under the statute) provides a distinctly awkward vehicle in which fairly to assess congruence and proportionality, or otherwise to evaluate the practical scope and operation of the FMLA.

Indeed, this Court has applied similar principles to avoid premature or unnecessary consideration of constitutional issues in the context of Section 5 legislation. In *Garrett*, for example, this Court dismissed as improvi-

dently granted the constitutional question of whether Title II of the Disabilities Act's abrogation of Eleventh Amendment immunity was valid Section 5 legislation precisely because the parties had not briefed the statutory question of whether Title II was applicable to the claims at issue in that case. "We are not disposed to decide the constitutional issue whether Title II * * * is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question." *Garrett*, 531 U.S. at 360 n.1. That same principle should be applied here.[5]

3. This case also presents an inappropriate vehicle for certiorari because of its interlocutory character, such that this Court's review may ultimately be unable to provide the petitioners with meaningful, practical relief. This Court's usual practice is not to grant review

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[5] While the Court traditionally favors the resolution of jurisdictional questions before the merits of parties' claims are addressed, see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-102 (1998), that precept does not translate readily to jurisdictional objections based on the Eleventh Amendment, which does not operate like a traditional limitation on subject matter jurisdiction:

> The Eleventh Amendment * * * does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. * * * Nor need a court raise the defect on its own.

Wisconsin Dep't of Corrs. v. *Schacht*, 524 U.S. 381, 389 (1998) (citations omitted); see also *id.* at 394-395 (Kennedy, J., concurring); *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, No. 01-298 (May 13, 2002); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) (Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction").

when cases are in an interlocutory posture because the relief sought from this Court ultimately might prove unnecessary or be rendered ineffectual. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the litigation), with *United States* v. *Virginia*, 518 U.S. at 526, 530 (review granted after final judgment). While the claim of Eleventh Amendment immunity ordinarily would warrant a departure from that practice, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), the procedural posture in which this case arises and the narrow focus of the petition indicate that the Eleventh Amendment immunity might not insulate petitioners from either further litigation on the merits or damages.

First, the court of appeals held that, even if the family care provision is not appropriate Section 5 legislation, *Ex parte Young* suits seeking prospective injunctive relief would remain available for individuals to enforce the provision. Pet. App. 42a-43a; cf. *Garrett*, 531 U.S. at 374 n.9 (noting that *Ex parte Young* relief remains available for employment discrimination, even if the statutory provision is not appropriate Section 5 legislation). The petition does not seek review of that aspect of the court of appeals' opinion. Thus, assuming that Hibbs can make the appropriate showing of supervisory authority on remand (see Pet. App. 43a), then he may be able to obtain much of the declaratory and equitable relief that he seeks regardless of this Court's constitutional ruling.

In addition, as a practical matter, the availability of proceedings on remand under *Ex parte Young*, will impose the very litigation burdens and compliance

obligations on petitioners that they ask this Court to relieve. See Pet. 14-15 (arguing that certiorari is appropriate because of the potential flood of litigation "about excessive leave"; the statute's perceived "hindrance to these States' hiring and firing practices"; and because the FMLA's substantive provisions allegedly leave States "no longer free to fire chronically-absent employees, or hire others to replace the absent employees, for fear that they will be required to defend their decisions in protracted federal court litigation"). Because those complaints about the purported statutory burden apply equally to aspects of the court of appeals' judgment from which petitioners have not sought review, they provide no sound basis for an exercise of the Court's certiorari jurisdiction.

Second, this Court's review will not necessarily insulate petitioners from liability for money damages. In addition to his core FMLA claim, Hibbs raised a retaliation claim. See Complaint 8. The FMLA separately prohibits retaliation against any individual for "opposing any practice made unlawful by this subchapter," 29 U.S.C. 2615(a)(2). Petitioners' summary judgment motion, however, did not assert Eleventh Amendment immunity with respect to the retaliation claim (see Def. Mot. for Summ. J. 13-19) (addressing solely the leave provisions of the FMLA)); the court of appeals did not address the question; and petitioners have not sought such a ruling from this Court.[6] The question presented is specifically confined to the abrogation effected by the family medical care leave

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[6] Petitioners' supplemental brief to the court of appeals likewise confirmed "that only the provision of the FMLA that allows for leave to care for a family member with a serious medical condition is actually in dispute herein." Def. Supp. C.A. Br. 10.

provision. See Pet. i. It thus is uncertain whether, in the context of this particular litigation, this Court's ruling on the single abrogation question presented will offer a practical litigation benefit to the State.[7]

4. The court of appeals' decision is correct. Four fundamental and well-established constitutional propositions lay the foundation for Congress's appropriate exercise of its Section 5 powers in the family medical care provision of the FMLA. First, the Section 5 power to abrogate Eleventh Amendment immunity extends to legislation combating gender discrimination. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452-456 (1976) (gender discrimination provision in Title VII validly abrogates Eleventh Amendment immunity as Section 5 legislation).

Second, this country "has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality). Indeed, the history of state action "denying rights or opportunities based on sex" is recorded in "volumes of history." *United States* v. *Virginia*, 518 U.S. at 531. Gender classifications have long been used to "create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 534. State laws pertaining to employment were not immune from those discriminatory attitudes; to the contrary, they fueled and perpetuated

[7] Cf. *Rhode Island Dep't of Envtl. Mgmt.* v. *United States*, 286 F.3d 27, 42 (1st Cir. 2002) ("the individual appellants have a colorable argument that the [environmental law's] whistleblower provisions were enacted to safeguard First Amendment rights that have long been made applicable to states through the Fourteenth Amendment"); *Roberts* v. *Pennsylvania Dep't of Pub. Welf.*, No. Civ. A. 99-3836, 2002 WL 253945, at *2 (E.D. Pa. Feb. 20, 2002) (holding, post-*Garrett*, that anti-retaliation provision of Americans with Disabilities Act is valid Section 5 legislation).

the stereotypes of women's appropriate roles as homemakers and caregivers. See, *e.g.*, *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 193 n.7 (1974); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948); *Muller* v. *Oregon*, 208 U.S. 412 (1908); *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1872).

Third, the Section 5 power allows Congress to prohibit and eliminate the lingering effects of past discrimination, as well as to take prophylactic measures designed to prevent their recurrence. See, *e.g.*, *Garrett*, 531 U.S. at 365 ("Congress' power to enforce the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.") (internal quotation marks omitted); *Gaston County* v. *United States*, 395 U.S. 285 (1969) (constitutionally valid literacy tests may be proscribed to combat the ripple effects of past discrimination).

Fourth, Section 5 legislation designed to combat historic and entrenched discrimination—discrimination that has triggered and continues to trigger the application of heightened scrutiny by this Court—has been sustained as appropriate Section 5 legislation without a legislative record documenting a history of constitutional violations by the States. See *Oregon* v. *Mitchell*, 400 U.S. 112, 133-134 (1970) (Black, J.); *id.* at 147 (Douglas, J.); *id.* at 216 (Harlan, J.); *id.* at 233-236 (Brennan, White & Marshall, JJ.); *id.* at 283-284 (Stewart, J., joined by Blackmun, J., & Burger, C.J.) (nationwide ban on literacy tests upheld, despite geographically limited evidence of abuse); *Katzenbach* v. *Morgan*, 384 U.S. 641, 669 & n.9 (1966) (Harlan, J., dissenting) (literacy test ban added to statute on the

floor of Congress); see also *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980).

Against those background principles, Congress made clear its intent that the family medical care provision was designed "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] [C]lause." 29 U.S.C. 2601(b)(5). The provision "minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available * * * for compelling family reasons, on a gender-neutral basis[.]" 29 U.S.C. 2601(b)(4).

The FMLA's legislative history demonstrates that Congress both sought to address the type of discrimination based on gender stereotypes that the Fourteenth Amendment condemns and acted against a documented history of discrimination in employment hiring and benefits decisions by States. Testimony before Congress showed that, because employers assume, based on stereotypical views of the woman's role as a caregiver, that women will require greater accommodations at work to meet family-care obligations, employers are more reluctant to hire women or to promote them to positions of responsibility equal to men. See, *e.g.*, *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 99th Cong., 2d Sess. 100 (1986) ("[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second"). The evidence before Congress demonstrated that these forms of gender discrimination are pervasive not just in the private sector, but in the public sector as well. See, *e.g.*, *id.* at 147. The FMLA's family care provision thus

targets the lingering and hard to root out effects of manifold state statutes and practices that limited women's opportunities to participate in the workforce on equal terms and that perpetuated the stereotypical employer view of women workers as less reliable employees because they are presumed to be the family caregivers.

The FMLA leave provision, moreover, is an appropriate and congruent means of combating the problems Congress identified. Because "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender," 29 U.S.C. 2601(a)(6), Congress ensured that "leave is available * * * on a gender-neutral basis." 29 U.S.C. 2601(b)(4). By setting a minimum standard for family leave for all eligible employees, the FMLA extends to men the types of leave benefits more often available to women and, at the same time, helps to eliminate the stereotype that only women are responsible for family caregiving, while deterring employers from making hiring and promotion decisions based on stereotypes about how family responsibilities should be allocated.

The FMLA is narrowly targeted—it affects only one aspect of the employment relationship, and it accomplishes its purposes "in a manner that accommodates the legitimate interests of employers," 29 U.S.C. 2601(b)(3). For example, the FMLA requires only unpaid leave, 29 U.S.C. 2612(a)(1), and excludes certain employees, including state employees who hold high-ranking or sensitive positions, 29 U.S.C. 2611(2), 2611(3), 203(e)(2)(C). The Act requires employees to give notice of foreseeable leave, 29 U.S.C. 2612(e), and permits employers to require certification by one or

more health care providers of the need for leave, 29 U.S.C. 2613. The relevant provisions of the Act apply only to employees who have been employed for at least twelve months and who have performed "at least 1,250 hours of service with [the] employer during the previous 12-month period." 29 U.S.C. 2611(2)(A).

Finally, Congress calibrated the FMLA's provisions based on extensive testimony from "a wide range of employers that already provide family and medical leave." See S. Rep. No. 3, 103d Cong., 1st Sess. 12 (1993). From "this testimony, and from a wide body of study and research data," Congress concluded that "family and medical leave is cost-effective in terms of reduced hiring and training costs, turnover, and absenteeism." *Id.* at 12-13. In choosing twelve weeks as the appropriate leave floor, moreover, Congress chose "a middle ground, a period considered long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.'" *Ragsdale*, 122 S. Ct. at 1164 (quoting 29 U.S.C. 2601(b)). The FMLA's family medical care provision, in short, is tailored to enforcing, remedying, and preventing a documented history of discrimination and unconstitutional stereotyping of workers based on gender.

Lastly, petitioners repeatedly request (Pet. 8, 15, 24) summary reversal of the court of appeals' decision. We are aware of no case in which this Court has ever summarily reversed a decision *sustaining* the constitutionality of an Act of Congress, and petitioners' request that this Court do so fails to accord the Congress and the President—coordinate branches of government—the respect due to their exercise of their constitutional duties and their independent constitutional judgments on legislation. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (adjudicating the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2002

(17)

Supreme Court, U.S.
FILED
MAY 20 2002
OFFICE OF THE CLERK

No. 01-1368

In the Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *ET AL.*,

Petitioners,

v.

WILLIAM HIBBS, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent William Hibbs asks leave to proceed *in forma pauperis*. The respondent has not previously sought leave to proceed *in forma pauperis* in any other court.

Respondent's declaration in support of this motion is attached hereto.

Respectfully submitted,

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45 pp

DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, William Hibbs, am the respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month
	You	Spouse	You
Employment	$_____	$_____	$1150.00
Self-employment	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____
Gifts	$_____	$_____	$_____
Alimony	$_____	$_____	$_____
Child Support	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$640.00	$_____	$_____
Unemployment payments	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____
Total Monthly Income:	$_____	$_____	$_____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross Monthly Pay
White Pine Sch. Dist.	Ely, NV	9-91-91 to present	$1,400/month
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

3 List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross Monthly Pay
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

4 How much cash do you and your spouse have? $ Nothing in addition to what is listed in response to 01 (no reserve). Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	
_____	_____	$_____	
_____	_____	$_____	

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

[x] Home
Value 21,000.00

[ ] Other real estate
Value _____

[x] Motor Vehicle #1 1966 Ford
Year, make & model Bronco
Value $1200.00

[ ] Other real estate
Year, make & model _____
Value _____

[ ] Other assets
Description _____
Value _____

6.

7. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you

	Amount owed to your spouse	
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

8. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	
_____	_____	
_____	_____	

9. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? [ ] Yes [X] No Is property insurance included? [ ] Yes [X] No	$_____	$_____
Utilities (electricity, heating fuel, water, sewer, and telephone)	$250/mo.	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$500/mo.	$_____
Clothing	$20/mo.	$_____
Laundry and dry-cleaning	$50/mo.	$_____
Medical and dental expenses over	$600/mo.	$_____
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$300/yr.	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$600/yr.	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$312/yr.	$_____
Installment payments		
Motor Vehicle	$_____	$_____
Credit card(s)	$_____	$_____
Department store(s)	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

10 Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

[ ] Yes [X] No If yes, describe on an attached sheet.

11. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form? [ ] Yes [X] No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

12. Have you paid - or will you be paying - anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

[ ] Yes [X] No

If yes, how much? _____

13. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 4/3, 2002

(Signature)

No. 01-1368

IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

No. 01-1368

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT

1. Congress enacted the Family and Medical Leave Act of 1993 ("FMLA" or "Act") "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] clause [of the Fourteenth Amendment]." 29 U.S.C. § 2601(b)(5). Congress found that lack of employment policies to accommodate employees' needs to care for sick family members can force individuals into conflicts between family and job. *Id.* § 2601(a)(2), (a)(3). In particular, Congress found that, "due to the nature of the roles of men and women in our society"—roles that States supported—"the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." *Id.* § 2601(a)(5). The FMLA relieves women of some of the disproportionate burden of family care by accommodating their family medical leave needs and by making family medical leave available to men who had often been denied it based on their sex. The Act seeks "to balance the demands of the workplace with the needs of families ... in a

manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons ... on a gender-neutral basis." *Id.* § 2601(b)(4).

The FMLA entitles eligible employees to take up to 12 work weeks of *unpaid*, job-protected leave per year in certain circumstances that place extraordinary demands on families: the birth, adoption or foster care placement of a child (subsections (A) & (B)); the need to care for a spouse, child or parent with a serious health condition (subsection (C)); or the employee's own serious health condition that renders him or her unable to perform the functions of the job (subsection (D)). *Id.* § 2612(a)(1). Upon return to work at the conclusion of FMLA leave, an employee must be reinstated to his or her former position or its equivalent. *Id.* § 2614(a). The Act enforces those entitlements by making it unlawful to "interfere with, restrain or deny the exercise of" FMLA rights, *id.* § 2615(a)(1), and prohibiting retaliation against any individual for "opposing any practice made unlawful by this subchapter," *id.* § 2615(a)(2); *see also* 29 C.F.R. § 825.220(e) ("Individuals ... are protected from retaliation for opposing ... any practice which they reasonably believe to be a violation of the Act or regulations.").

FMLA remedies include equitable relief such as reinstatement, damages for lost pay and benefits or other actual monetary losses sustained (capped at an amount equal to 12 weeks of wages or salary for the employee), interest, and fees and costs. 29 U.S.C. § 2617(a)(1)(A)(i) & (ii), (a)(1)(B), (a)(3). If an employer cannot demonstrate that its challenged conduct was in good faith and based on a reasonable interpretation of the Act, the employer may also be liable to the employee for liquidated damages in an amount equal to the total actual damages plus interest. *Id.* § 2617(a)(1)(A)(iii). Congress clearly expressed its intent to abrogate States' sovereign

immunity by defining covered "employers" to include "any public agency" as defined in the Fair Labor Standards Act, *id.* § 203(x).

2. This case arose out of a dispute between respondent William Hibbs and petitioners, his state employers, over whether leave other employees donated to Hibbs under Nevada's Catastrophic Leave program ran concurrently (as petitioners contend) or consecutively (as Hibbs contends) with the 12 weeks leave to which the federal FMLA entitled him. Petitioners' position depends, at a minimum, on their having given Hibbs FMLA-mandated prompt, individualized notice when he began his Catastrophic Leave that they intended to count it against his FMLA leave entitlement. The record shows that petitioners failed to give any such notice. It further shows that they fired him in response to his insistence that they were misreading the FMLA, and at a time when his FMLA leave, running consecutively, had not expired.[1]

Hibbs was a Welfare Eligibility Certification Specialist in the Reno District Office of the Nevada Department of Human Resources (DHR) Welfare Division. In 1996, his wife, Dianne, suffered a severe neck injury when the car in which she was a passenger was involved in a collision. D. Exs. J, K, O.[2] Surgery in October 1996 left her with acute and chronic left arm and neck pain. By Spring of 1997, she suffered a range of serious medical complications, including liver damage and addiction as a result of prescribed pain medication, anxiety attacks, clinical depression, and suicidal tendencies, necessitating at one point that she be admitted to a hospital psychiatric unit. She had a metal plate with screws in her neck from which the screws stripped

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[1] In reviewing a case decided on a defendants' motion for summary judgment, this Court applies to the factual record the same standard as would the district court, crediting the plaintiff's version of the facts insofar as a reasonable jury could so find, based on evidence in the record and favorable inferences drawn therefrom. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *see* Fed. R. Civ. P. 56(c), (e).

[2] " D. Ex. __" refers to exhibits accompanying defendants' motion for summary judgment, which is included in their record excerpts on appeal at CR 55.

and loosened to the point of pressing against her esophagus, requiring her to be extremely careful when moving her body so as to avoid a potentially fatal puncture. D. Exs. J, K, CC, DD. Her doctors advised additional surgery and constant personal care, preferably by her husband, before the surgery. The Hibbses scheduled the surgery for November 1997, the recommended specialist's first available date. D. Exs. CC, DD.

In April and May, 1997, Hibbs applied for 12 weeks of unpaid FMLA leave to care for his wife while retaining his job with the Welfare Division. D. Exs. I, J, K. His request was granted on June 23, 1997, for FMLA leave to be taken as needed through December 1997. D. Exs. L, M. The approval notice stated that the leave would "be counted against [his] annual FMLA leave entitlement." *Id.* While his FMLA leave request was pending, Hibbs learned that he might be eligible for paid leave under Nevada's Catastrophic Leave program, and accordingly applied for such leave on June 2, 1991. D. Ex. D. Under the Catastrophic Leave program, employees with accrued, unused annual or sick leave may donate it to other employees to permit them to take paid leave in specified circumstances, including an immediate family member's serious illness or accident. NEV. REV. STAT. 284.362 to 284.3629. Qualifying employees may request up to a maximum of 26 weeks, or 6 months, of catastrophic leave in a calendar year. NEV. REV. STAT. 284.3622. Hibbs preferred to use Nevada Catastrophic Leave first, and save his unpaid federal FMLA leave for when paid leave donations were no longer available. P. Ex. 1 (Hibbs Aff. ¶ 9).[3] Hibbs received leave pledges from other employees and obtained approvals for approximately nine and a half weeks of catastrophic leave. D. Exs. O, T.[4]

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[3] "P. Ex. __" refers to exhibits to plaintiff's motion for partial summary judgment, which appear at Tab D in plaintiff-appellant's exercpts of record on appeal.

[4] His request for paid catastrophic leave was initially approved on August 11, 1997, for up to 5 weeks of paid leave, D. Ex. O, and an additional 4 ½ weeks of paid catastrophic leave was approved on September 17, 1997, D. Ex. T. Although the second request was approved for 4 ½ weeks of leave (180 hours), only 144 hours of leave had been donated specifically for his use, leaving him 36 hours short. D. Ex. W. The DHR Director's Office approved the additional 36 hours out of the Department's Catastrophic Leave account on October 15, 1997. D. Ex. Z.

Hibbs had started taking unpaid FMLA leave intermittently after June 23, when his FMLA leave request was approved, and he started taking such leave full time after August 5. *See* Pet. App. 2a. When his first paid Catastrophic Leave grant took effect on August 11, *see* D. Exs. P, N, he had already used approximately 3 weeks of FMLA leave, with approximately 9 weeks of unpaid FMLA leave remaining. The Catastrophic Leave donations allowed Hibbs to be on full-time paid leave from August 11 until mid-October, when he expected to be able to rely on his remaining unpaid FMLA leave to carry him through his wife's late-November surgery and initial recuperation.

The FMLA permits employers to require their employees to "substitute any of the accrued paid vacation leave, personal leave, ... family leave [or medical or sick leave] of the employee for leave provided under subparagraph ... (C)." 29 U.S.C. § 2612(d)(2)(A). The employer may only count those forms of paid leave as FMLA leave, however, if the employer gives the employee advance notice of its intent to do so "within one or two business days [after notice of the need for leave is given] if feasible." 29 C.F.R. §§ 825.208(a), 825.301(c). *See generally Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002). Hibbs had no advance notice, however, that his employers would seek to count his use of donated Catastrophic Leave against his entitlement to 12 weeks of unpaid FMLA leave.[5]

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[5] The court of appeals erroneously stated that Hibbs "was informed that the [catastrophic leave] would 'be counted against [his] annual FMLA leave entitlement,'" Pet. App. 2a, when in fact the phrase the court quotes appears only on the form approving Hibbs' first request, for 12 weeks of *unpaid FMLA leave*, and specifies that *that* leave would be counted against his annual FMLA leave entitlement. D. Ex. R. Petitioners nonetheless suggest that that form gave Hibbs adequate notice that the Catastrophic Leave would run concurrently with his FMLA leave. In support of their claim that they gave notice, they also point to (1) two boilerplate reminders regarding filling out Biweekly Time and Attendance sheets (BTAs) to "Be sure to use the

An October 10, 1997, letter from petitioners informed respondent that his "FMLA leave of 12 weeks has been fulfilled," and that all donated catastrophic leave hours would be exhausted by October 13. D. Ex. X.[6] The letter concluded: "Welfare personnel is requiring an updated physician notice explaining your wife's diagnosis, prognosis and need for your presence no later than October 15, 1997. At that time you will need to decide whether your intent is to return back to work or reapply for additional catastrophic leave." *Id.* Hibbs provided an updated doctors' certification and on October 15 requested 200 more hours of paid catastrophic leave, D. Ex. AA, seeking full-time paid leave until late November. On October 21, the Welfare Division approved it and sent it to the Office of the Director of the Nevada Department of Human Resources for final signature. *Id.* The remaining unpaid leave, if used consecutively with that additional Catastrophic Leave, would have covered Hibbs until late January, 1998.

Believing that he had additional paid Catastrophic Leave and should still be able to use the balance of his unpaid FMLA leave when the Catastrophic Leave expired, Hibbs initiated a meeting on November 3, 1997, with petitioner Firpo and his immediate supervisor, Sue Schultz. Hibbs updated them on his wife's health problems, including his plans to take her to the

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appropriate codes when recording your FMLA CATASTROPHIC leave, ANNUAL (FMAL), SICK (FMS), FAMILY SICK (FMFS), CATASTROPHIC (FMCL), LWOP (FMLP))," Exs. Q, U; and (2) a memo stating "[i]f you do not want to use 40 hours per week of Catastrophic Leave, your BTA should reflect FMLP for the hours not covered by the Catastrophic Leave," Ex. P; *see* Def.'s Mot. Summ. J. at 4; D. App. Br. at 8. Those documents did not notify Hibbs that petitioners would count his Catastrophic Leave against his FMLA leave entitlement. (Moreover, when an employee is on leave from work, his employer ordinarily is the person who fills out and submits the BTAs, and that practice was followed with respect to Hibbs when he was on leave. P. Ex. 2 at 93 (Perwein Dep. 43). Hibbs filled out no BTAs after July 25, 1997.) In any event, the court of appeals did not specify when notice was given, and the issue of whether or when any notice was given remains unresolved in this preliminary posture.

[6] Once the missing 36 hours of the 180 hours approved on September 17 was obtained from the leave bank, Hibbs apparently had an additional 4 1/2 days of approved, paid leave, *i.e.* until October 20. *See supra* n. 4.

specialist in Arizona for surgery within the coming weeks. D. Ex. CC.[7] He also stated his hope to be available to return to work by January 5, 1998, D. Ex. CC, DD, and he explained that his only expectation was to be able to take his unpaid leave and return to his job. That expectation was based on Hibbs' belief that if he started his remaining unpaid leave when his paid leave ran out, that would provide the remaining time he needed. *See* D. Exs. CC, DD; P. Ex. 1 (Hibbs Aff. ¶¶ 9, 12). Petitioner Firpo told him she would review the available information and options, and assured him that he would be given "ample notice of any decision taken by Nevada State Welfare." D. Ex. CC.

The situation abruptly changed following the November 3 meeting. On November 5, petitioners retracted their support of the Catastrophic Leave upon which Hibbs was then relying, recalling the papers from the Director's Office where they were awaiting final approval. *See* D. Ex. AA (handwritten notation). On November 6, petitioner Firpo personally delivered to Hibbs' home a letter stating that "[n]o additional catastrophic leave or leave without pay will be granted," asserting that "[i]t is time for you to make other arrangements for your wife's care," and requiring him to report to work on November 12 or face disciplinary action. D. Ex. EE. On November 7 at 7:50 a.m., Hibbs called petitioner Firpo to say that his wife's surgery was imminent, and that he doubted he could return to work on November 12. D. Ex. FF. Firpo insisted that no more time off would be authorized. *Id.* When Firpo delivered a written reprimand to Hibbs on November 13, Hibbs reiterated his understanding that he still had unpaid FMLA leave and asked what had happened to that leave. P. Ex. 1 (Hibbs Aff. ¶ 11); D. Exs. GG, HH. Firpo said that she could not answer leave questions. P. Ex. 1 (Hibbs Aff. ¶ 11). Hibbs

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[7] Hibbs' affidavit identifies the date of the meeting as November 6, whereas Firpo's and Schultz's file memos date it as November 3. *See* P. Ex. 1 (Hibbs Aff. ¶¶ 8, 12); D. Ex. CC, DD. For current purposes, we assume that the meeting took place on November 3.

responded that his wife's condition had not improved, and that he wished to use his unpaid FMLA leave. *Id.* (¶ 12).

On December 5, petitioner Firpo recommended Hibbs' dismissal for having been "absent without leave" since November 12, D. Ex. II, and the dismissal became effective on December 22, 1997, Pet. App. 3a. After a postponement while her husband prepared for and participated in a hearing relating to his dismissal, *see* Pet. App. 3a, Dianne Hibbs underwent surgery in Arizona around the end of 1997.

3. On April 20, 1998, Hibbs filed suit in federal district court against the Nevada Department of Human Resources, its director, Charlotte Crawford,[8] and the Director of the DHR Welfare Division, Nikki Firpo. Hibbs claimed that petitioners violated the FMLA by retaliating against him when he opposed their efforts retroactively to count his catastrophic leave against his FMLA leave, and for firing him when he was on approved, unexpired FMLA leave.[9] Hibbs sought back pay, damages, declaratory and injunctive relief including reinstatement, interest, fees and costs, and all other appropriate relief. On petitioners' motion for summary judgment, the district court ruled from the bench that Hibbs' FMLA claim was barred by the State's sovereign immunity. Pet. App. 47a-58a.

4. The United States intervened on appeal to defend the constitutionality of retrospective relief in private actions against state employers who violate 29 U.S.C. § 2612(a)(1)(C), and the court of appeals reversed the grant of summary judgment for petitioners on the FMLA claim. In a unanimous opinion, the court held that Congress, in authorizing family medical leave, had clearly expressed its intent to abrogate the States' Eleventh Amendment immunity, Pet. App. 8a-

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[8] By the time Hibbs filed his Complaint, Crawford had replaced the previous Director, Myla Florence.

[9] He also asserted federal due process and state law claims that are not at issue here.

9a, and that it had the authority to do so under section 5 of the Fourteenth Amendment in order to remedy and prevent unconstitutional sex discrimination, Pet. App. 12a-42a. The court first underscored that, in contrast to its deferential approach to age or disability discrimination, this Court's heightened standard of equal protection review of sex-based discrimination should correspond to a decreased burden on Congress to demonstrate its grounds for identifying an equal protection problem warranting remediation and deterrence pursuant to its section 5 authority. Pet. App. 17a-19a. The court went on to find that the legislative history showed "widespread intentional gender discrimination by states," whose "discriminatory leave policies are just the sort of difficult and intractable problem that justifies broad prophylactic measures in response." Pet. App. 21a. Alternatively, the court found ample support for the FMLA's remedial character in the fact that it was "designed to undo the impact of [a] history of state-supported and mandated sex discrimination as it continues to affect public and private employment." Pet. App. 23a.

The court of appeals concluded that the FMLA is a congruent and proportional response to States' unconstitutional sex discrimination because the Act "focuses on only one type of policy," family leave, the guarantee of which Congress concluded would be a "a modest step" toward counteracting sex discrimination by state and non-state employers alike. Pet. App. 40a. The court reasoned that a sex-neutral remedy, rather than one targeted only at women, is congruent and proportional because the discrimination affects both sexes. A sex-neutral solution both avoids unconstitutionally benefiting women alone based on over-broad generalizations that men do not also need family medical leave, and blunts incentives to discriminate against women born of expectations that they will take more leave than men. *Id.* at 36a-40a. Further, the court

concluded that "the statute protects job security, not wage continuation," and thus "is *not* principally concerned with providing an economic benefit." *Id.* at 40a.

The court of appeals accordingly reversed and remanded the case for further proceedings. The remand order included respondent's FMLA claim against the State, as well as his FMLA claims against the individual defendants seeking reinstatement under *Ex Parte Young*. Pet. App. 43a-44a & n.32, 46a. Petitioners did not seek panel or *en banc* rehearing. The panel granted petitioners' motion to stay the court of appeals' mandate, over respondent's opposition.

REASONS FOR DENYING THE PETITION

The petition should be denied as unripe. Petitioners seek interlocutory review of a constitutional question that might be avoided if the case were permitted to proceed to final judgment. The question petitioners present would be moot if Hibbs were to recover on his retaliation theory because the validity of 29 U.S.C. § 2615(a)(2), barring retaliation against employees for opposing practices the FMLA makes unlawful, is appropriate section 5 legislation enforcing the First Amendment without regard to whether the grant of family medical leave in section 2612(a)(1)(C) is appropriate as remedial and prophylactic equal protection legislation. The question presented could equally prove moot on other grounds suggested but not fully developed in the record.

The only reason petitioners offer for granting immediate review in the face of those contingencies is the need for clarity about whether the States must comply with the FMLA, but whether private actions for damages are available to enforce section 2612(a)(1)(C) will not alter the indisputable legal obligation of Nevada and every other State in the Ninth Circuit to comply with that provision. Immediate review also would have little or no effect on the State of Nevada's litigation burdens, because Hibbs' *Ex Parte Young* claim against the individual

government officials for reinstatement necessitates litigation of the merits of his claim of violation of section 2612(a)(1)(C) in any event, and his retaliation claim entitles him to seek the full amount of his damages directly against the State. In contrast to the negligible burdens denial of review would impose on the State, Hibbs would suffer from the delay of litigating in this Court while the lower court's mandate is stayed. He has already pressed this case for more than four years in the lower courts while awaiting reinstatement to his job, yet his entitlement even to non-damages relief has been stayed pending resolution of the petition.

Given the benefits of further litigation in the lower courts and the absence of need for immediate review, the negligible conflict between the decision below and a lone contrary appellate case does not warrant this Court's exercise of its discretionary certiorari jurisdiction—especially given that the decision below correctly upholds a provision of federal law entitled to a strong presumption of constitutionality. This Court should deny the petition and permit the case to be litigated to final judgment, at which time both the necessity, if any, of deciding the constitutional question and the context for doing so will be clear.

I. CERTIORARI SHOULD BE DENIED IN LIGHT OF STRONG REASONS TO AVOID PREMATURE DECISION OF A CONSTITUTIONAL QUESTION THAT MAY BE AVOIDABLE, AND THE LACK OF NEED FOR INTERLOCUTORY REVIEW BY THIS COURT.

The petition is unripe because petitioners seek this Court's review of a non-final order remanding the case. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (citing *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 257-58 (1916)).[10] The principle that sovereign immunity claims ordinarily are resolved at

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[10] *See American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893) (Supreme Court ordinarily should not review interlocutory decision "unless [immediate review] is necessary to prevent extraordinary inconvenience and embarrassment to the conduct of the cause."); Robert L. Stern et al., *Supreme Court Practice* § 2.2, at 40 (7th ed. 1993)

the outset of litigation, *see Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), does not support a discretionary grant of certiorari to review the interlocutory order in this case. Instead, because further proceedings would allow potentially informative record clarification[11] and may render petitioners' constitutional question moot, the doctrine of constitutional avoidance strongly supports denying the petition.[12] There are any number of ways in which the question presented in the petition could become moot.[13] In

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(discussing ordinary practice of "declin[ing] to exercise its discretionary jurisdiction to review judgments that are not final").

[11] For example, one equal protection basis Congress identified supporting enactment of the FMLA was the discrimination that occurred when leave decisions were made on a case-by-case basis at employers' sole discretion. *See infra* Point III. Explication in this case of facts relevant to that problem could provide the Court with a more concrete appreciation of relevant dynamics. Potentially relevant facts might be the circumstances of employees similarly situated to Hibbs whom petitioners permitted to use different types of leave consecutively while Hibbs was denied the ability to do so.

[12] This Court should not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J. concurring); *see id.* at 347 ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *Lyng v. Nothwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of necessity of deciding them."); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

[13] This Court's recent decision in *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), which altered the remedial inquiry for claims (like Hibbs') of lack of notice that another form of leave is being counted against the FMLA leave entitlement, could conceivably eliminate Hibbs' claim for retrospective relief. The damages claim appears likely to survive *Ragsdale*. First, it is not at all clear, even if notice had been given, that the FMLA would permit substitution of Catastrophic Leave donated by other employees. The statute only authorizes substitution of "any of the accrued paid vacation leave, personal leave, family leave [or medical or sick leave] of the employee," 29 U.S.C. § 2612(d)(2)(A), and Catastrophic Leave donated by other employees does not clearly qualify as "accrued ... family [or medical] leave ... of the employee." Second, although the record on the point is undeveloped, Hibbs seems likely to be able to satisfy the *Ragsdale* requirement of proof of actual harm caused by petitioners' failure to give the required notice, such as by showing "that []he would have taken less leave or

particular, if Hibbs were to receive full monetary relief under his First Amendment retaliation theory, that would moot the need to decide the question presented here.

A. Congress's Clear Authority To Ban Retaliation for First Amendment-Protected Employee Speech Fully Supports the Judgment Below and Makes Immediate Decision of Petitioners' Broader Section 5 Question Inappropriate.

Even if section 2612(a)(1)(C) of the FMLA is supported only by the Commerce Clause and not by section 5 of the Fourteenth Amendment, the State is properly subject to suit for all of the retrospective relief Hibbs seeks. No meaningful protection of the State's dignitary interest would be attained by granting the petition. *Cf. Puerto Rico Aqueduct*, 506 U.S. at 146. That is because, whether or not section 2612(a)(1)(C) of the FMLA has section 5 support, Congress has section 5 power to enforce public employee speech rights against retaliatory discharge through a separate provision of the FMLA, section 2615(a)(2). Under the FMLA, it is unlawful for any employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise" FMLA rights such as by firing an employee because he is on subsection (C) FMLA family medical leave, 29 U.S.C. § 2615(a)(1), and it is unlawful to "discharge or in any manner discriminate against any individual for opposing any practice made unlawful" by the FMLA such as by firing an employee for opposing the employer's erroneous interpretation of the FMLA, *id.* § 2615(a)(2); 29 C.F.R. § 825.220(e). Here, in addition to contending that petitioners interfered with his exercise of FMLA rights by firing him when he was on leave, in violation of section 2615(a)(1), Hibbs also claims that they retaliated against him when, starting at the November 3

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intermittent leave if [he] had received the required notice." *See Ragsdale*, 122 S. Ct. at 1161-63. The Court should deny review at this stage to allow such contingencies to be resolved. The constitutional question petitioners present "ought not be decided except in an actual factual setting that makes such a decision necessary." *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-95 (1981)).

meeting, he voiced his opposition to petitioners' unlawful reading of the FMLA. That alleged retaliation, if true, constituted a violation of section 2615(a)(2). And this retaliation-for-opposition provision of the FMLA has targeted section 5 support based on the First Amendment that is distinct from the overlapping but broader equal protection ground on which the court below relied.[14]

The FMLA's authorization of retrospective relief against state employers who engage in such retaliation is at the core of Congress's power under section 5 to enforce the First Amendment's Free Speech Clause through the Due Process Clause of the Fourteenth Amendment. FMLA retaliation claims generally, and Hibbs' in particular, are based on conduct that is protected by the First Amendment Freedom of Speech Clause as this Court has interpreted it. This Court's cases prohibit retaliation against public employees for nondisruptive speech on matters of public concern. *Pickering v. Board of Educ.*, 391 U.S. 563, 573-574 (1968); *Connick v. Myers*, 461 U.S. 138, 155 (1983). Even employee speech that is motivated by a desire to defeat adverse employment action may still address matters of public concern. *See Connick*, 461 U.S. at 141, 150 (concluding that some of the matters that employee raised in an effort to avoid being transferred were issues of public concern); *Rankin v. McPherson*, 483 U.S. 386, 397-398 (1987) (Scalia, J., dissenting) (emphasizing distinction between motive for and content of employees' remark). First Amendment protection "is not lost to the public employee who

[14] There is a genuine factual issue as to whether petitioners fired Hibbs in retaliation for his opposition to their interpretation of the FMLA. It was at the November 3 meeting that Hibbs first asserted to his supervisors, Sue Schultz and petitioner Nikki Firpo, that the FMLA, as he understood it, required FMLA leave to run consecutively and not concurrently with other forms of leave. *See* D. Ex. CC, DD; P. Ex. 1 (Hibbs Aff. ¶¶ 9, 12). The sequence of adverse actions against Hibbs immediately following the November 3 meeting, culminating in Hibbs' discharge, raises an inference of retaliatory motive on petitioners' part that a factfinder would be permitted to credit. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (close temporal proximity between employer's awareness of protected activity and adverse employment action can give rise to an inference of retaliatory motive).

arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979); *see Rankin*, 483 U.S. at 387 n.11 ("The private nature of the statement does not ... vitiate the status of the statement as addressing a matter of public concern."); *Connick*, 461 U.S. at 152-54.[15] Here, just as in *Givhan*, what is at stake is an employee assertion, made privately to a supervisor in the context of a disputed personnel action, that an employer was violating important federal rights. Hibbs' statements, and employees' stated opposition to unlawful employer practices generally, are matters of public concern under this Court's precedents.

The FMLA's anti-retaliation protection is purely remedial, analogous to the legislation prohibiting race-based juror qualification that this Court sustained in *Ex Parte Virginia*, 100 U.S. (10 Otto) 339 (1879), and not to the broader, prophylactic legislation at issue in *Garrett*, *Kimel*, *Florida Prepaid* and *Boerne*, and is thus *per se* congruent and proportional. It is only when a statute prohibits "a broader swath of conduct" than is barred by this Court's constitutional cases that a detailed congruence and proportionality analysis is needed to discern whether the statute is appropriate Fourteenth Amendment legislation.[16] In order to sustain the FMLA's anti-retaliation

[15] Opposition to practices that the FMLA makes unlawful is more than mere "complaint about a change in the employee's own duties," *United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995), or garden-variety "criticism directed at a public official," *Connick*, 461 U.S. at 149. Congress is well within its section 5 power in treating criticism of the states' administration of federal civil rights laws as a matter of public concern for First Amendment purposes.

[16] *Cf. Board of Trustees of University of Alabama at Birmingham v. Garrett*, 531 U.S. 356, 365 (2001) (section 5 legislation "reaching beyond the scope of § 1's actual guarantees must exhibit" congruence and proportionality."); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("preventive rules" are appropriate remedial measures only where there is "a congruence between the means used and the ends to be achieved").

remedy, there is no need to approve a protective buffer zone around state employees' First Amendment rights, so no special showing of any pattern of violations need be made.

Although the court of appeals, in sustaining section 2612(a)(1)(C), did not analyze the distinct question of Congress's section 5 authority to enforce public employees' constitutional right to free speech by providing remedies against unlawful retaliation, its decision was valid on that alternative section 5 ground. Hibbs has consistently pressed his retaliation theory, and there is no question of waiver.[17] The First Amendment retaliation theory of Congress's section 5 power is not, however, itself ripe for review on certiorari in the absence of any circuit conflict.[18] That alternative rationale justifying Hibbs' damages claim instead underscores both the lack of any pressing need to decide petitioners' question at this time, and the awkwardness of this case as a vehicle for review of that question. Were this Court to grant review, it would be faced with

[17] As the prevailing party, Hibbs is "of course free to defend [his] judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the district court or the court of appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Respondent has properly raised this claim. He has alleged retaliation as a basis for his FMLA claim in his complaint, *see* Complaint ¶ 34, and he has consistently pursued his retaliation theory in the trial court, *see, e.g.*, Pl.'s Mot. for Partial Summ. J. at 16, and on appeal, *see, e.g.*, Plaintiff-Appellant's Br. (10/14/99) at 8, 19, 22, 24. The distinct argument that the FMLA retaliation provision is valid under section 5 as enforcement of First Amendment speech rights is "not a new claim within the meaning of that rule, but a new argument to support what has been [respondent's] consistent claim," and is thus not subject to waiver. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

[18] The only lower courts to have considered this argument have at least provisionally credited it. *See Roberts v. Pennsylvania Dep't of Public Welfare*, No. Civ.A.99-3836, 2002 WL 253945 (E.D. Pa. Feb. 20, 2002) (holding that provision of Americans with Disabilities Act that forbids an employer from taking adverse action against an employee for "opposing any act or practice made unlawful" by the ADA is valid §5 legislation to enforce First Amendment); *cf. Rhode Island Dep't of Envtl. Mgmt. v. United States*, 286 F.3d 27, 42 (1st Cir. 2002) (viewing as "colorable" an argument that an environmental statute's whistleblower protection was "enacted to safeguard First Amendment rights that have long been made applicable to states through the Fourteenth Amendment," and dismissing claim on other grounds).

the unattractive choice of either considering the alternative theory before the courts of appeals have had an opportunity to do so, or rendering a decision limited to petitioners' question presented that may well become moot if Hibbs ultimately prevails on the alternative retaliation ground. For all these reasons, the petition should be denied.

B. Denying the Petition Will Not Affect the State's Legal Obligation To Comply with the FMLA or Burden the State with Unnecessary Litigation.

The only reason petitioners offer in support of immediate review at this interlocutory stage of the litigation is that the decision creates legal "uncertainty" that is a "hindrance" to the "hiring and firing practices" of States in the Ninth Circuit. Pet. 15. But, contrary to petitioners' assertions, *id.*, the decision below has no effect on whether state officials are "free to fire" employees for exercising their FMLA rights. Petitioners' section 5 challenge affects only the availability of judicially ordered retrospective relief against States, not the legal standards governing States' primary conduct. Even were petitioners to prevail on their sovereign immunity defense, they would not be relieved of their legal obligation under the Supremacy Clause to comply with the FMLA, which is indisputably valid as Commerce Clause legislation applicable to government and private employers alike. *See* U.S. Const. art. VI, cl. 2; *Alden v. Maine*, 527 U.S. 706, 732 (1999) ("When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States."); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The FMLA is enforceable not only through private actions, but also in administrative or civil actions by the Secretary of Labor, 29 U.S.C. § 2617(a), (b), in which the availability of monetary relief is unaffected by the scope of Congress's section 5 power.

The availability of retrospective relief also, as a practical matter, has virtually no impact on the litigation burdens the petitioners must face in federal court. Respondent has live claims

for prospective injunctive relief under *Ex Parte Young* against supervisory employees, petitioners Nikki Firpo and Charlotte Crawford, which the court of appeals included in its remand and petitioners do not challenge here. Pet. App. 42a-44a & n. 32.[19] Petitioners' sovereign immunity defense has no bearing on Hibbs' claims for prospective relief, including reinstatement, fees and costs against state officials. *See Ex Parte Young*, 209 U.S. 123 (1908); *Hutto v. Finney*, 437 U.S. 678, 695 (1978). Litigation of the *Ex Parte Young* claims involves the same witnesses, the same evidence, and the same trial on the merits as litigation of the damages claim. Indeed, under respondent's First Amendment retaliation theory, the amount of monetary relief would also have to be determined, even if 29 U.S.C. § 2612(a)(1)(C) did not validly abrogate the State's sovereign immunity. *See supra* Point I.A.

II. PETITIONERS VASTLY OVERSTATE THE EXTENT OF THE CONFLICT AMONG THE CIRCUITS, WHICH DOES NOT WARRANT IMMEDIATE RESOLUTION BY THIS COURT.

The circuit conflict is minimal and, especially in view of the strong reasons to avoid interlocutory review in this case, *see supra* Point I, the issue should be left to percolate further in the courts of appeals before this Court reviews it. The petition is limited to the question whether a damages remedy for States' violations of 29 U.S.C. § 2612(a)(1)(C) is appropriate legislation under section 5 of the Fourteenth Amendment, and petitioners assert that the court of appeals decision sustaining that remedy conflicts with decisions of eight other circuits and one state high court. *See* Pet. 8. As the court of appeals pointed out and petitioners acknowledge, however, virtually all of the courts that have held that section 5 fails to support FMLA retrospective relief

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[19] The court below apparently erred in believing that the availability of relief under *Ex Parte Young* depends on whether the defendant officials are "employers" under the FMLA, Pet. App. 44a n.32, because "the inquiry into whether suit lies under *Ex Parte Young* does not include an analysis of the merits of the claim." *Verizon Maryland Inc. v. Public Util. Comm'n of Maryland*, 535 U.S. __, slip op. at 10 (May 20, 2002).

against state employers have done so in the context of claims under a different statutory provision from the one at issue here, *i.e.*, section 2612(a)(1)(D) regarding personal medical leave as opposed to section 2612(a)(1)(C) regarding family medical leave.[20] "The difference matters," the court of appeals explained, because the family medical leave provisions are more clearly "an attempt to remedy gender discrimination." Pet. App. 6a; *see also Laro v. New Hampshire*, 259 F.3d 1, 9 (1st Cir. 2001) (expressly limiting holding to section 2612(a)(1)(D), because "[th]e constitutional arguments in support of the remaining provisions have greater strength and raise issues (for instance, their implications for family roles) not at issue here"); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000) (expressly limiting holding to the personal medical leave provision); *Garrett*, 193 F.3d at 1219 (opinion limited to "the provision at issue here," *i.e.* section 2612(a)(1)(D)); *see generally Garrett*, 531 U.S. at 360 n.1 (finding no section 5 support for ADA Title I, but declining to address adequacy of such support for ADA Title II). Indeed, some of the decisions invalidating retrospective relief under subsection (D) expressly contrast its invalidity with the apparent validity of subsection (C) and thus accord rather than conflict with the court of appeals' decision at issue here.[21] The Department of Justice makes the same distinction, having

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[20] *See Laro v. New Hampshire*, 259 F.3d 1, 11 (1st Cir. 2001); *Lizzi v. Alexander*, 255 F.3d 128, 131, 135 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000); *Chittister v. Department of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Garrett v. University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001); *Schall v. Wichita State Univ.*, 7 P.3d 1144, 1162 (Kan. 2000); *but see Thomson v. Ohio State Univ. Hosp.*, 238 F.3d 424, 2000 WL 1721038 (6th Cir. 2000) (unpublished disposition); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000).

[21] *See Laro*, 259 F.3d at 12 (identifying sex discrimination that "provides a rationale for the parental and family-care leave provisions," and observing that a legislative record deficient with respect to personal medical leave does document discrimination "with respect to parental leave ... and perhaps leave to care for family members"); *see also Garrett* 193 F.3d at 1220 (personal medical leave provision, in contrast to the other FMLA provisions, derives no support from suggestions that the FMLA is designed to "protect women from discrimination due to issues

declined to defend the constitutionality of subsection (D) damages against state employers, while actively defending the same remedy here and in other subsection (C) cases.[22]

Only two courts of appeals (in addition to the Ninth Circuit in this case) have considered whether employees may recover retrospective relief against States pursuant to 29 U.S.C. § 2612(a)(1)(C). *See Thomson*, 238 F.3d 424; *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000). *Thomson*, however, was an unpublished, *per curiam* opinion. Under the Sixth Circuit's own rules, "citation of unpublished decisions in briefs and oral arguments" is disfavored, "except for the purpose of establishing res judicata, estoppel, or law of the case." Local Rule 28(g). Sixth Circuit unpublished opinions therefore have little, if any, precedential value. *See id.*; *see also United States v. Smithers*, 212 F.3d 303, 323 (6th Cir. 2000); *Hall v. Shipley*, 932 F.2d 1147, 1151 (6th Cir. 1991). *Thomson* thus does not create a circuit conflict calling for this Court's resolution.

Thus, as the court below recognized, only the divided panel decision in *Kazmier* is at odds with the decision in this case. The *Kazmier* panel concluded, over a strong dissent by Judge Dennis, that FMLA subections (C) and (D) do not validly abrogate state sovereign immunity.[23]

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regarding pregnancy, child care, and care taking of family members"). The thoughtful dissenting opinions in those cases further explain the validity of subsection (C). *See Laro*, 259 F.3d at 17 (Lipez, J., dissenting); *Garrett*, 193 F.3d at 1220 (Cook, J., dissenting).

[22] *See* Letters from Theodore B. Olson to J. Dennis Hastert, Speaker of the House of Representatives, and Richard B. Cheney, President of the Senate *re: Bates v. Indiana Dep't of Corrections, No. IPO1-1159-C-H/G (S.D. Ind.)* (Dec. 20, 2001) (communicating Solicitor General's decision not to defend 29 U.S.C. 2612(a)(1)(D) as appropriate section 5 legislation but reserving judgment as to other subsections) (letters lodged with the Court); Brief for the United States as Intervenor-Appellant in *Bylsma v. Davis*, No. 01-16102-A (11th Cir. filed April 9, 2002) (defending 29 U.S.C. 2612(a)(1)(C) as appropriate section 5 legislation).

[23] The fact that the Fifth Circuit in *Kazmier* engaged in a distinct subsection (C) analysis, rather than simply relying on its subsection (D) analysis as dispositive with respect to both provisions, supports the conclusion of the court below (Pet. App. 5a-6a) that the cases dealing only with subsection (D) raise distinct section 5 issues and thus do not conflict with the decision

Even where the lower courts are in clear conflict, this Court often defers consideration of novel questions of law to permit further development. The conflict between the decision below and a single, divided decision from another circuit is not a sufficient reason to warrant this Court's review here.[24] The inappropriateness of review at this time is highlighted by the lack of a final order, indicating that the issue petitioners raise may not be dispositive and that the record remains unsettled. *See supra* Point I. The prudent course is thus to deny the petition at this time.

III. THE DECISION BELOW IS CORRECT.

Section 2612(a)(1)(C) of the FMLA is a nuanced and limited measure seeking to remedy and deter States' unconstitutional sex discrimination, and is thus a valid exercise of Congress's power under § 5 of the Fourteenth Amendment. Petitioners' request for summary reversal is utterly inappropriate, and both it and the request for plenary review should be denied.

Section 2612(a)(1)(C) addresses a familiar and lamentable sex discrimination problem in the job market today: *States frequently act on the assumption that a woman is more likely than a man to need time away from work to care for her family.* This assumption is almost always unspoken, is usually not intended to signal any disrespect for either sex, and is exceedingly difficult to prove. Moreover, as the court of appeals explained, it has long roots in past, overt, sex-based state policies that "treat[ed] women as non-essential workers, with principal

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below regarding subsection (C). *See Kazmier*, 225 F.3d at 525 ("[W]e discern no reason why the provisions of one of the FMLA's subsections could not validly abrogate the States' Eleventh Amendment immunity even if the provisions of some or all of the remaining subsections fail to do so.")

[24] It remains unclear whether even this minimal conflict may resolve itself without this Court's intervention. Given that the Fifth Circuit has yet to speak *en banc* on the issue, the law could ultimately crystalize in a subsequent case in that court in conformity with the views of Judge Dennis in *Kazmier* and the Ninth Circuit in this case. *Cf., e.g., United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc) (reversing panel decision and thereby eliminating circuit conflict regarding whether the United States is covered by reference to "whoever" in 18 U.S.C. § 201(c)(2)).

responsibility for the family." Pet. App. 23a. As a generalization about current average tendencies of women and men, it may be a factually accurate one. But state decisions based on the assumption that, because of sex, a woman is more likely than a man to want and/or need to be away from work to take care of her family plainly violate equal protection as this Court has interpreted it.

This Court's cases skeptically scrutinize and presumptively reject any state decision based on sex, including those based on overbroad notions about the capacities and preferences of men and women. *See generally United States v. Virginia*, 518 U.S. 515, 533 (1996). This Court has repeatedly recognized the pervasive part that sex-role stereotypes have played in maintaining inequality between men and women, and has been vigilant in striking down States' actions that are predicated on notions that a woman's place is in the home. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Orr v. Orr*, 440 U.S. 268 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972). When States treat female and male employees differently due to sex-based assumptions that they will have differential responsibilities in staying home to care for sick family members, they violate the Equal Protection Clause as this Court has interpreted it. Such sex-based generalizations are constitutionally forbidden even when they intend no disrespect of women, *see Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *Orr*, 440 U.S. at 283, and even where as a general matter they may be factually supported, *see Virginia*, 518 U.S. at 542; *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994); *id.* at 149 (O'Connor, J., concurring), *Craig v. Boren*, 429 U.S. 190, 201 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975).

One equal protection problem to which section 2612(a)(1)(C) responded was the continuing incidence of overt sex discrimination in state leave policies. As the court of appeals observed, "the legislative history of the FMLA contains substantial evidence of gender

discrimination with respect to the granting of leave to state employees, and ... it therefore justifies the enactment of the FMLA as a prophylactic measure." Pet. App. 20a. The court pointed to studies in the legislative history

> show[ing] significant gender-based disparities in the coverage of state leave *policies*. They thus indicate widespread intentional gender discrimination by states. Moreover, the studies show that this discrimination has persisted despite the existence of 42 U.S.C. § 1983 and Title VII, long after the 1978 enactment of the Pregnancy Discrimination Act made discrimination on the basis of pregnancy an actionable form of gender discrimination under Title VII. Altogether then, the studies show that states' discriminatory leave policies are just the sort of difficult and intractable problem that justifies broad prophylactic measures in response.

Pet. App. 21a.

Second, in adopting section 2612(a)(1)(C), Congress was also prompted in part by equal protection problems associated with the fact that many employers (including Nevada and most other States) offered no entitlement to family medical leave.[25] The absence of a right to family leave, while not facially sex-based, raised extant and potential equal protection problems to which section 2612(a)(1)(C) responded.

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[25] At the time of the FMLA's passage, 32 states lacked any law applicable to state employees that conferred a right to family medical leave (as distinct from pregnancy disability or parental leave). Of the 18 states that had family medical leave policies, all but one (Illinois, enacted in 1983) were enacted after 1987 when the FMLA's immediate precursors were already under consideration in Congress. *See* ALASKA STAT. § 23.10.500-.550 (enacted 1992); CAL. GOV'T CODE § 12945.2 (enacted 1991); P7-4-12, 4 COLO. CODE REGS. § 801-2 (6-91) (enacted 1987); CONN. GEN. STAT. § 5-248a, 248b (enacted 1988); FLA. STAT. ANN. § 110.221 (enacted 1991); GA. CODE ANN. § 45-24 (enacted 1992); HAW. REV. STAT. §§ 79-32, 398-1 to -10 (enacted 1991); ILL. COMP. STAT. 415/8c (enacted 1983); ME. REV. STAT. ANN. tit. 26, §§ 843-849 (enacted 1988); N.J. STAT. ANN. § 34:11B-1 to -16 (enacted 1989); N.D. CENT. CODE § 54-52.4 (enacted 1989); OKLA. STAT. tit. 74, § 840.7C (enacted 1989); OR. REV. STAT. § 659.560-.570 (enacted 1992); R.I. GEN. LAWS § 28-48-1 to -10 (enacted 1990); VT. STAT. ANN. tit. 21, §§ 470-474 (enacted 1991); WASH. REV. CODE § 49.78.010-.901 (enacted 1989); WIS. STAT. § 103.10 (enacted 1987). Moreover, the few states that did begin offering family medical leave once the FMLA was under consideration had not only failed previously to provide family medical leave, but also provided no pregnancy disability, maternity or paternity leave rights (*see, e.g.*, Oklahoma, Maine, West Virginia), or provided only pregnancy disability leave for women, with no family leave for either sex (*see, e.g.*, California, Connecticut, Florida, Hawaii, New Jersey, Oregon, Rhode Island, Vermont, Washington).

When employees lacked a right to family medical leave, purely discretionary family leave decisions were often infected by the prevalent sex-based assumptions identified above regarding differential male and female family leave needs. Employers use their discretion to be more generous in granting leave to women than to men, based on a general perception that women bear greater family responsibilities and so have a more pressing need than do men to take time off from work in order to provide family care. Extending greater leave opportunities to women than to similarly situated men due to sex-based assumptions about differential needs—rather than actual, sex-neutral evaluation of needs in individual cases—violates men's equal protection rights.

No-leave state policies also imposed a disproportionate adverse impact on women which, in this context, violated equal protection. The court of appeals found ample support for section 2612(a)(1)(C)'s remedial character in the fact that it was "designed to undo the impact of [a] history of state-supported and mandated sex discrimination as it continues to affect public and private employment." Pet. App. 23a. Although disparate impact on women does not, taken alone, violate equal protection, *see Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), where, as here, the disparity is a continuing effect of past intentional discrimination, it is unconstitutional, *id.* at 272 (a neutral law with a disproportionate adverse impact on a protected class violates equal protection where "that impact can be traced to a discriminatory purpose"). Because the history of pervasive state-sponsored sex discrimination substantially contributed to the current discriminatory effect of a facially sex-neutral failure to grant family medical leave, remedying that discriminatory effect is well within Congress's power under § 5. *See Boerne*, 521 U.S. at 526 (citing with approval reasoning of Brennan, J., in *Oregon v. Mitchell*, 400 U.S. 112, 235 (1970), that facially neutral literacy requirements which the Court previously upheld

against equal protection challenge could be barred by Fourteenth Amendment legislation because the literacy requirements' discriminatory effects resulted from previous unconstitutional governmental discrimination in education).

The court of appeals relied on the FMLA's legislative history recounting "the harmful and extant effects of [state-supported] stereotypical gender roles on women's participation in the workforce," including the fact that working women were disproportionately likely to be caretakers for sick relatives, and were often forced to quit their jobs to care for their relatives. Pet. App. 33a-34a (quoting H.R. Rep. No. 103-8(I) at 24 (1993); S. Rep. No. 102-68 at 28 (1991)). The court also catalogued a history of explicit sex-based classifications in state law, including maximum-hour and minimum-wage laws and night work prohibitions for women but not men, various restrictions on the types of tasks or occupations in which women could participate, and sex-based restrictions on employment benefits for widowers that did not equally apply to widows. Pet. App. 24a-28a.[26] By the time Congress took up the subject of job-protected family medical leave,

> [s]tate support for stereotypical gender roles had allowed American employers—including the states—to develop and function without accommodating workers' home responsibilities during emergencies. Because women filled the caretaking role during times of crisis, men were expected to continue their work without interruption from domestic responsibilities. And, even as women entered the workplace in greater numbers, the continuing expectation that women would assume responsibility for domestic concerns put a burden on both working women and working men, hindering women's ability to compete equally in the marketplace while making it difficult to recast family responsibilities by sharing critical responsibilities at home.

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[26] Contrary to petitioners' suggestion, Pet. 21, these judicial decisions are relevant whether or not Congress explicitly cited them. *See Garrett*, 531 U.S. at 376 (Kennedy, J., concurring); *South Carolina v. Katzenbach*, 383 U.S. 301, 311-12 (1966) (reviewing prior Fifteenth Amendment litigation in this Court as relevant support for the Voting Rights Act provisions under that amendment's enforcement clause).

Pet. App. 31a-32a. The court noted that the FMLA's text and history "quite explicitly reflect this same understanding of the historical dynamic, and an intent to change it." *Id.* at 32a (citing 29 U.S.C. § 2601(a)(5); H.R. Rep. No. 103-8(I), at 16-17 (1993); S. Rep. No. 102-68, at 37 (1991)); *see also The Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 100th Cong. (1987) (statement of Donna Lenhoff).

Congress in the FMLA addressed discrimination by States and private sector employers alike.[27] Such express congressional focus on public as well as private employers sharply distinguishes section 2612(a)(1)(C) from other laws this Court has held are not valid exercises of Congress's section 5 power. The Court in *Garrett* stressed that Congress expressly limited its employment-discrimination findings in the ADA to "the private sector." *Garrett*, 531 U.S. at 371-72. The Court concluded that "Congress' failure to mention the States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action has been documented." *Id.* at 372. The evidence of state discrimination in the legislative record could not suffice to overcome the clear implication of the statutory findings that the challenged ADA provision responded only to private-sector discrimination. By contrast, in enacting the FMLA Congress addressed patterns of leave discrimination common to both public and private sector employers.

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[27] Congress received compelling evidence that public-sector employees were faring no better than their private-sector counterparts. *See, e.g., The Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 99th Cong. 30 (1986) (statement of Meryl Frank, Yale Bush Center) ("public sector leaves don't vary very much from private sector leaves"); *id.* at 90 (statement of Barbara Easterling, Communications Workers of America) (unions representing both private- and public-sector employees reached the same conclusion regarding their "public and private sector members"); 139 Cong. Rec. H399 (daily ed. Feb. 3, 1993) (remarks of Rep. Bishop) (recounting receiving complaints from people "who were employed in State government and who were employed in the private sector").

As the court of appeals noted, it is of paramount importance here that the FMLA, unlike the statutes at issue in *Kimel*, *Garrett*, and *Florida Prepaid*, is aimed at remedying sex discrimination, which is subject to heightened constitutional scrutiny. *Cf. Kimel v. Florida Board of Regents*, 528 U.S. 62, 88 (2000) (emphasizing that age classifications, unlike those based on sex or race, are not subject to heightened judicial scrutiny, and explaining that "[s]trong [prophylactic legislative] measures appropriate to address one harm may be an unwarranted response to another, lesser one").[28] In applying heightened constitutional scrutiny to sex-based distinctions, this Court has itself taken judicial notice of the pervasiveness of sex discrimination in governmental decision making, and has also relied on Congress's competence in identifying patterns of invidious discrimination. *See Virginia*, 518 U.S. at 531 ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."); *J.E.B.*, 511 U.S. at 136 ("our nation has had a long an unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today") (internal quotation and citation omitted); *Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973) (plurality) (taking note that "women still face pervasive, although at times more subtle, discrimination in our national institutions, in the job market and, perhaps most conspicuously, in the political arena," and recounting Congress's role in identifying and remedying sex discrimination). Just as this Court is empowered to observe the nature and breadth of the

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[28] Petitioners find it "baffling" (Pet. 23) that the court of appeals below did not cite *United States v. Morrison*, 529 U.S. 598 (2000), which considered whether legislation aimed at remedying sex discrimination was appropriate under section 5. The Court in *Morrison* did not, however, question the assertions in that case of pervasive gender-motivated bias in state justice systems, but held that the statute was not appropriate section 5 legislation because it was directed at private persons, not state actors. *See id.* at 619-26.

problem of sex discrimination in general terms as a justification for applying heightened judicial scrutiny to respond to it, so, too, is Congress warranted in enacting remedial and prophylactic legislation based on its accumulated understanding of the historic and continuing function of sex-role stereotypes in perpetuating unconstitutional sex discrimination in employment and leave decisions, without providing detailed documentation in the legislative history of a widespread pattern of state sex discrimination in family medical leave. In any event, a "lack of support in the legislative record is not determinative" so long as the targeted constitutional "wrong or evil" is identified to the Court. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 646 (1999). There is simply no question, in light of Congress's express findings as well as the legislative history, that Congress identified a problem of unconstitutional sex discrimination and enacted section 2612(a)(1)(C) to remedy and prevent that discrimination.

The remedy Congress chose was a sex-neutral requirement that an employer hold an employee's job open for the time (up to 12 weeks) during which the employee needs to be absent to care for a sick family member. That remedy is congruent and proportional to the equal protection problems Congress addressed. The remedy is sex-neutral, because, as is so often the case with equal protection problems, both men and women suffered distinct kinds of harm from the discrimination Congress identified. Men's leave needs were taken less seriously than women's under discretionary policies, but women nonetheless were especially burdened by the lack of a right to leave. Congress feared, however, that providing leave rights to women only would "have serious potential for encouraging employers to discriminate" against them. 29 U.S.C. § 2601(a)(6). Doing so also would not be "consistent with the Equal Protection Clause," because, where a sex-neutral remedy served as well or better, denying the same rights to

similarly situated men would be unconstitutional. *Id.* § 2601(b)(4). The FMLA's creation of a sex-neutral, unpaid, and voluntary family leave entitlement is an especially fitting response to sex discrimination, because it ensures that employees have the opportunity to depart from traditional sex roles without insisting that they do so.

Congress acted appropriately in adopting a nationally uniform statute. Contrary to petitioners' suggestions, Pet. 15-16, 22-23, section 5 legislation does not "require[]... geographic restrictions." *Boerne*, 521 U.S. at 533. Indeed, even though more that 30 States lacked literacy requirements at the time, the Voting Rights Act's prohibition of English literacy requirements upheld in *Katzenbach v. Morgan* applied nationwide. 384 U.S. 641, 643 n.1, 654 n.15 (1966). Unlike some of the forms of racial discrimination in voting addressed through geographically focused provisions of the Voting Rights Act, *see South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the sex discrimination that the FMLA targets is not a regional phenomenon. The evidence in the legislative history and this Court's own cases instead reflects sex-based attitudes and practices that pervade our national culture, and are not particularly tied to political geography.[29]

Petitioner's objection to Congress "us[ing] its enforcement power to create an entitlement" as opposed to a "prohibition" (Pet. 17) misses the mark, because Congress undeniably has Commerce Clause power to create the entitlement, and must rely on its section 5 power only to provide for damages against state employers. Moreover, section 2612(a)(1)(C)

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[29] Additionally, Congress's desire to work cooperatively with the States calls for a uniform remedy. The National Conference of State Legislatures endorsed the FMLA early in the legislative process. *See The Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Families, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources, Part 2*, 100th Cong. 305 (1987) (statement of Roberta Lynch, AFSCME, referring to NCSL endorsement). It would have been out of keeping with the spirit of federal-

does not mandate that employers grant a "fixed ... benefit" of 12 weeks of family medical leave, Pet. 22, but only requires that employers permit as much time off as is actually needed to care for a family member's serious health condition, up to an annual ceiling of 12 weeks. *See* 29 U.S.C. § 2613. The FMLA guarantees only that an employer will hold the employee's job and continue to pay benefits if an employee demonstrably needs, and is willing to take, *unpaid* leave. *Id.* § 2612(c).

The 12-week ceiling in the FMLA is not arbitrary and intrusive, Pet. 17-18, 22, but was carefully drawn with substantial input from public and private employers as unlikely to impose significant burdens on employers, while still providing a meaningful amount of job-protected leave to employees.[30] Congress noted evidence that granting such unpaid leave would result in cost savings from decreased turnover, hiring and training of replacements, and that the net cost to employers of providing job-protected unpaid leave could be as inexpensive as $5.30 to $6.70 per employee per year.[31] The congressionally mandated follow-up study on experience with the FMLA showed a median length of FMLA leave of 10 days, and that 80 per cent of leaves pursuant to the FMLA were for 40 days or fewer. The study reported that the vast majority of employers in fact experienced little or no cost from FMLA compliance. Commission on Leave,

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state cooperation in support of the FMLA to point fingers at any subset of states as particularly culpable.

[30] That kind of empirically based judgment in the fashioning of legislative remedies is particularly within congressional competence and is entitled to deference. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n. 12 (1985).

[31] *See* S. Rep. No. 103-3, at 16-18 (1993); *The Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm on Labor and Human Resources*, 102d Cong. 12, 13, 23, 35, 91 (1991); *see also* S. Rep. No. 103-3, at 14 (describing survey of a handful of States that did have family and medical leave laws, which revealed that "sizable majorities of covered employers reported that the State laws were neither costly nor burdensome to implement.").

United States Department of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 125-26 (1996); *see also Balancing the Needs of Families and Employers, Family and Medical Leave Surveys*, 6-13 (2000 Update).[32]

The FMLA's 12-week standard is easily understood and administered. Petitioners' attempt to draw an analogy between "the substantial costs" imposed on States by the Religious Freedom Restoration Act remedies invalidated in *Boerne* and section 2612(a)(1)(C) of the FMLA, Pet. 18, is badly exaggerated. That comparison only underscores how slight is the impact of the right to unpaid family medical leave. This Court observed in *Boerne* that RFRA's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." 521 U.S. at 532. RFRA applies to every state agency and all state laws and decisions. Its "stringent test" requires States to demonstrate a compelling governmental interest and that the challenged approach is the least restrictive means of furthering that interest, a test triggered by a threshold claim of a "substantial burden" on the exercise of religion—a claim that is often highly contextual and "difficult to contest." *Boerne*, 521 U.S. at 533-534. The FMLA, by contrast, sets a clear and easily administered standard for the maximum amount of job-protected unpaid leave covered employees may expect to take for family care in any given year. Given the validity of Title VII, which imposes both disparate-treatment and disparate-impact standards, as legislation enforcing the equal protection prohibition against sex discrimination in employment in general,

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[32] Several other features of the FMLA tailor it so as to minimize burdens on employers, including states. The Act exempts employees who have not worked for the employer for at least 12 months and a minimum of 1,250 hours, 29 U.S.C. § 2611(2)(A), as well as certain highly compensated employees, *id.* § 2614(b), and employees in certain high-level or sensitive positions, *id.* §§ 2611(3), 203(e)(2)(C). The Act requires employees, where feasible, to give employers advance notice of their leave needs and make efforts to minimize any disruption of

see generally Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the constitutionality of the narrowly fashioned and minimally burdensome FMLA remedy follows *a fortiori*.

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the employer's operations, *id.* § 2612(e), and, where requested, to provide information to substantiate the family member's serious health condition, *id.* § 2613.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 01-1368

IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

v.

WILLIAM HIBBS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

This case clearly satisfies the standards for granting review. It concerns a recurring federal question—whether 29 U.S.C. § 2612(a)(1)(C) exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment—that all concede divides the lower courts. No one contests the importance of this question. And the Ninth Circuit's decision fails to follow the analytical path marked by this Court's Section 5 jurisprudence.

Since the petition was filed, twelve States have filed an *amici curiae* brief that supports these points. In addition, the *amici* demonstrate that the decision below exposes the Ninth Circuit States to the risk of overwhelming litigation: of the Nation's 4.8 million state employees, nearly *one-fifth* are employed in the Ninth Circuit alone, and all may now sue their state employer whenever they object to its leave decisions. (Br. 18). The *amici* brief also powerfully confirms that § 2612(a)(1)(C) was not intended to remedy unconstitutional state gender discrimination. To the contrary, Congress commended the "[a]pproximately 30 States, the District of Columbia and Puerto Rico [that had] adopted some form of family or medical leave." (*Id.* 8).

Failing to contest the circuit split or the significance of the question presented, respondents argue that the split is narrow and attempt to manufacture non-existent "vehicle problems." These arguments are red herrings and should not deter the Court from reviewing the important constitutional issue cleanly presented by this case.

1. Hibbs fails to dispute, and the United States concedes, that this case presents an "important constitutional question—going to the heart of Congress's Section 5 power." (U.S. Opp. 10). The State *amici* (Br. 18) agree. Thus, whether one considers the vantage point of the Federal Government, the States or state employees, the issue in this case is sufficiently important to warrant this Court's review.

2. Respondents do not, and cannot, deny that the lower courts are divided over the question presented. They, and the Ninth Circuit (Pet. App. 5a), acknowledge that *at least* two circuit courts (the Ninth and Fifth) have issued conflicting opinions. (Opp. 20; U.S. Opp. 9).

3. Respondents, instead, argue that the division is limited to these courts and thus is "nascent" and "narrow." (Opp. 18-21; U.S. Opp. 7-11).

a. Respondents cannot articulate, however, why this split is "nascent." In their combined 55 pages of briefing, respondents cannot identify a single legal theory concerning § 2612(a)(1)(C) that the lower courts did not consider in their thorough decisions. Having failed to suggest an alternative reading of the statute that might justify delaying this Court's review, respondents cannot reasonably claim that the courts' analyses will mature over time.

Respondents are wrong to suggest, moreover, that the lack of *en banc* review renders the current division of authority "nascent." (Opp. 21 n.24; U.S. Opp. 10). No court of appeals requires a party to file a petition for *en banc* review before filing a petition for writ of *certiorari*. *Cf.* 10th Cir. R. 35.1(B) (providing that no such filing is required); 11th Cir. R. 35-3 (same). Nor does this Court. To the contrary, the Court *routinely* resolves narrow splits concerning sovereign immunity without the benefit of *en banc* decisions.[1]

b. In addition, there are compelling reasons to decide the question presented now. If the Court were to postpone review, the delay would impose massive litigation costs on the

[1] *See, e.g., FMC v. S.C. State Ports Auth.*, No. 01-46, slip op. (May 28, 2002); *Univ. of Ala. Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990).

States of the Ninth Circuit and, more importantly, would substantially injure their dignity as sovereigns. Nevada respectfully submits that it should not be forced to bear these costs for the sake of undefined "percolat[ion]." (Opp. 18).

c. Presumably due to the importance of sovereign immunity, the Court, just this Term, granted *certiorari* to review an Eleventh Amendment question that implicated *no* split of authority despite the United States' opposition on the same nascency ground it asserts here. *See* Opp. of United States in *FMC v. S.C. State Ports Auth.*, No. 01-46, at 20 (filed Sept. 10, 2001) ("*S.C. State Ports Auth.* Opp."). Indeed, the Court has repeatedly granted *certiorari* to resolve immunity disputes (including disputes that led to *landmark* decisions) where no split of authority existed or where the split was limited to only two circuits.[2]

4. In any event, this split is much deeper than respondents argue. Like the Fifth Circuit, the Sixth Circuit has held that Congress exceeded its enforcement authority under § 2612(a)(1)(C). *See Thomson v. Ohio State Univ. Hosp.*, 238 F.3d 424, 2000 WL 1721038 (6th Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 562 (6th Cir. 2000). Respondents refuse to acknowledge the import of *Thomson* because it is unpublished.[3] (Opp. 20; U.S. Opp. 10 n.3). But the court's decision not to publish is explained fully by the fact that its holding was determined completely by earlier precedent. "*Sims* . . . compelled [it] to dismiss" the case "as

[2] *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706, 712 (1999); *Coll. Sav. Bank*, 527 U.S. at 671; *Coeur d'Alene*, 521 U.S. at 266; *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 38 (1994); *Penn. v. Union Gas Co.*, 491 U.S. 1, 6 (1989); *Finley v. United States*, 490 U.S. 545, 547 (1989); *Quern v. Jordan*, 440 U.S. 332, 334 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976).

[3] Contrary to respondents' claim, *Thomson*, although unpublished, has precedential value. (Br. 3 & n.2).

jurisdictionally precluded." *Thomson*, 2000 WL 1721038, at *3. Indeed, by *not* publishing, the court confirmed that *Thomson* did not "establis[h] a new rule of law," but merely applied precedent. *See* 6th Cir. Rule 206(a)(1). A careful reading of *Sims* and *Thomson* demonstrates that respondents' argument mistakenly elevates form over substance. Those opinions make clear that "[i]n the Sixth Circuit, the FMLA is not actionable by private citizens in federal court against a [S]tate." *Thomson*, 2000 WL 1721038, at *3.

The Ninth Circuit's decision also departs from the *standards* adopted by eight courts of appeal and a state court of last resort. (Pet. 8-13; Br. 3). Respondents' only answer to this argument is that these courts were considering a different provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), which (in their view) remedies disability discrimination and thus is not entitled to the presumption of constitutionality that § 2612(a)(1)(C) supposedly enjoys. (Opp. 18-20; U.S. Opp. 10 n.3, 11). But many of these courts did *not* limit their analysis to § 2612(a)(1)(D). They reviewed the FMLA's entire legislative history, found no evidence of any unconstitutional state conduct, and purported to invalidate the FMLA as applied to States *in its entirety*.[4] And contrary to respondents' suggestion, in *no* case did a court presume that § 2612(a)(1)(D) was only a disability law. Rather, all analyzed § 2612(a)(1)(D) under the Court's gender-discrimination jurisprudence.[5]

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[4] *See Lizzi v. Alexander*, 255 F.3d 128, 138 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000); *Sims*, 219 F.3d at 566; *Schall v. Wichita State Univ.*, 7 P.3d 1144, 1161 (Kan. 2000).

[5] *See Laro v. New Hampshire*, 259 F.3d 1, 10 (1st Cir. 2001); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 228 (3d Cir. 2000); *Lizzi*, 255 F.3d at 134; *Garrett v. Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214, 1228 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

5. Respondents also err by suggesting that Nevada's petition is an impermissible interlocutory appeal (or as Hibbs claims, is "unripe"). (Opp. 11; U.S. Opp. 15-16). It is beyond question that when a court denies a sovereign immunity claim the State has a *right* to an interlocutory appeal regardless of the nature of future proceedings. *See Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 770 n.2 (2000); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993). The supposedly contrary authority cited by respondents (Opp. 11; U.S. Opp. 16) is unpersuasive because it either predates *Puerto Rico Aqueduct*, which definitively decided the issue, or has *nothing* to do with an appeal of a sovereign immunity claim. In any event, the potential for further proceedings does not militate against granting the writ as this Court *frequently* reviews cleanly presented legal issues at an interlocutory stage.[6]

6. The United States is also wrong to suggest that, because the recent decision in *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), may undercut Hibbs' claims, the Court may "avoid" the constitutional question here by denying the writ and allowing the lower court to decide the claims' merit. (U.S. Opp. 12-15).

a. At the outset, this theory of constitutional avoidance is unfounded here because the theory's proponent, "takes no position on the ultimate question of whether *Ragsdale* disposes of Hibbs' claim[s]." (U.S. Opp. 13). The United States' failure to conclude that Hibbs' claims are meritless contradicts its suggestion that they are clearly barred by *Ragsdale*. Moreover, Hibbs has offered numerous reasons why *Ragsdale* is distinguishable that the United States has not addressed. (Opp. 12 n.13). It thus is impossible for any party

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[6] *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001); *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

to state with certainty how the lower court will rule on the issue.

b. This is merely prelude, however, to the more basic reason why the constitutional avoidance argument, in general, is flawed: it relies on an erroneous view of sovereign immunity. Contrary to what the United States (and Hibbs) suggests, the purpose of the Eleventh Amendment is not simply to protect the States' treasuries from damage awards and litigation costs but "to accord the States the respect owed them as joint sovereigns." *S.C. State Ports Auth.*, No. 01-46, slip op. at 20. As part of that respect, States have a "privilege not to be sued" *even on trivial claims*. *Puerto Rico Aqueduct*, 506 U.S. at 146 n.5. Accordingly, whether Nevada is entitled to sovereign immunity is a question, like subject matter jurisdiction, that precedes, and is independent of, any merits question.[7] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-102 (1998). Denying review, moreover, would not "avoid" the constitutional question but would force Nevada to litigate the merits of Hibbs' § 2612(a)(1)(C) claim, thereby *causing* the very constitutional injury at issue. The United States' argument, indeed, places Nevada in the bizarre position of having *to defend* Hibbs' claim in order to preserve its privilege to *avoid* having to defend against it.

c. The United States' reliance (U.S. Opp. 14-15) on a footnote in *Garrett* for the proposition that the Court does not review immunity issues relating to claims of questionable

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[7] The United States suggests in a footnote (U.S. Opp. 15 n.5) that, even though sovereign immunity generally limits a court's jurisdiction, it does not (like subject matter jurisdiction) prevent a court from considering a claim's merit because it is waivable. While a State's waiver of sovereign immunity may eliminate the Eleventh Amendment's jurisdictional impediment, immunity undoubtedly operates like any other limit on subject matter jurisdiction where, as here, it is *not* waived. *See Alden*, 527 U.S. at 730; *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119-20 (1984).

merit is misplaced. *See* 531 U.S. at 360 n.1. In the cited footnote, the Court explained that it would decide whether Title I of the Americans with Disabilities Act was valid Section 5 legislation but declined to review the validity of Title II. Although the parties had briefed the latter issue and the question presented arguably encompassed it, the Court explained that no one had even attempted to demonstrate how Title II was implicated on the facts alleged. And nothing in the lower court's decision indicated that it was. To be sure, *Garrett* would preclude Nevada from seeking review of the question "Does the FMLA abrogate sovereign immunity?" and then briefing whether § 2612(a)(1)(D), the sick leave provision, is constitutional without explaining how that provision is even implicated. But it says nothing about cases where, as here, all (including the lower courts) agree that a provision governs the conduct at issue, and the question is whether a claim under it is barred by immunity.

7. For many of the same reasons, respondents err by suggesting (Opp. 13-18; U.S. Opp. 15-18), that a *separate* claim for retaliation based on a *separate* provision of the FMLA and a *separate* claim under *Ex parte Young* somehow "avoid" (or alternatively "moot") a claim of immunity on the *independent* FMLA provision at issue here. The respondents' theory (Opp. 12; U.S. Opp. 16) is that the State will have to defend against litigation anyway so there is no "practical" benefit to the State's assertion of immunity. Just stating the argument demonstrates its flaws. Namely, like the constitutional avoidance point, this argument ignores that Nevada has a privilege *not to be sued* under § 2612(a)(1)(C), not just a right to avoid the cost of litigation. *See supra* pp. 6-7.

Presumably for this reason, the Court rejected the same argument by the United States earlier this Term. The United States opposed the petition in *South Carolina State Ports Authority*, in part, on the ground that the State would still be subject to suit under *Ex parte Young*, and thus the lower

court's sovereign immunity decision would have "little practical effect" on the State's treasury or its regulatory burden. *S.C. State Ports Auth.* Opp. at 20-21. The Court not only granted *certiorari* over this objection but explained that these "practical" considerations have nothing to do with the "primary function" of immunity. *S.C. State Ports Auth.*, slip op. at 20. Consistent with the *South Carolina* case, the Court has repeatedly reviewed decisions rejecting a State's assertion of sovereign immunity on one claim even though additional proceedings against it (or its officers) on a different claim were certain.[8]

With respect to Hibbs' lengthy "First Amendment retaliation theory" (Opp. 13-17), the argument is a transparent attempt to cloud this case with irrelevant, last-minute arguments. Hibbs' opposition is *the first time* this theory has ever been advanced in this litigation. This is not surprising. *None* of the many courts addressing whether the FMLA abrogates immunity has hinted that the First Amendment offers a constitutional footing for the legislation. And the Ninth Circuit has suggested that a retaliation claim *cannot* be asserted against a State if it is immune from suit for the underlying act, which is apparently why no party separately addressed the retaliation argument below. *See Demshki v. Monteith*, 255 F.3d 986, 988-89 (9th Cir. 2001).

8. Respondents offer only a tepid defense of the lower-court's decision. They nowhere explain how the Ninth Circuit's analysis can be squared with *Morrison*, *City of Boerne*, or *Katzenbach*. (Pet. 18-19). Indeed, the United States fails to cite *Morrison* or *Katzenbach*, while Hibbs miscasts *Morrison* as holding only that the Violence Against Women Act was "directed at private persons" (Opp. 27 n.28),

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[8] *See Garrett*, 531 U.S. at 362 n.2; *City of Boerne*, 521 U.S. at 512; *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *Fitzpatrick*, 427 U.S. at 451 n.7; *see also Seminole Tribe* (deciding Eleventh Amendment question prior to *Ex parte Young* issue).

when the Court also held that the Act was not appropriate Section 5 legislation. *See Morrison*, 529 U.S. at 625-26. And they never come to grips with the fact that § 2612(a)(1)(C) is not a remedy to discrimination—it does not require equality—but is *a substantive benefit*.

Under this Court's precedent, Section 5 remedies are permitted only in response to specific unconstitutional state conduct and must be congruent and proportional to that conduct. (Pet. 15-18). Here, Congress failed to identify *any* unconstitutional state conduct that would justify § 2612(a)(1)(C). To the contrary, the FMLA's history details and commends state family leave policies. (Br. 7-11). In light of this, respondents' contrary story, which pieces together unrelated snippets of history, is simply unpersuasive.[9] In addition, respondents cannot explain how the FMLA's required benefit of twelve weeks of leave is congruent and proportional to any unconstitutional conduct. If, as respondents suggest, § 2612(a)(1)(C) is a response to practices States have already outlawed, it cannot be understood as proportional to *anything*. Hibbs hints that this benefit is necessary to remedy the disparate impact caused by no-leave policies (Opp. 24), but again, there is nothing in the FMLA's legislative history, or even respondents' briefs, demonstrating that States failed to implement family leave as part of some purposeful discrimination. Accordingly, for these, and the reasons stated in the State *amici* brief, there is no basis for concluding that § 2612(a)(1)(C) is appropriate Section 5 legislation.

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[9] For the reasons stated in the State *amici* brief and Petition (Br. 14-18; Pet. 18-20), respondents' attempt to revive the Ninth Circuit's burden-shifting analysis is unpersuasive, and the United States' reliance (U.S. Opp. 21) on the "Purposes" section of the FMLA is misplaced. (Br. 11-13).

CONCLUSION

The petition should be granted or the decision of the court of appeals summarily reversed.

Respectfully submitted,

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No. 01-1368

IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF ALABAMA, ALASKA, DELAWARE, FLORIDA, HAWAII, INDIANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND UTAH, AS *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 29 U.S.C. § 2612(a)(1)(C) exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment.

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The States of Alabama, Alaska, Delaware, Florida, Hawaii, Indiana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and Utah ("the *amici* States") respectfully submit this brief, as *amici curiae*, pursuant to Sup. Ct. R. 37.4. The *amici* States submit this brief in support of the petition for a writ of certiorari filed in this case by the Nevada Department of Human Resources, et al.

INTEREST OF *AMICI CURIAE*

State governments employ more than 4.8 million full- and part-time workers.[1] As some of the nation's largest employers, the States have a significant practical interest in federal employment laws and policies, particularly those that may expose State governments to liability for civil damages. As guardians of their citizens' public fisc, the States also have an interest in ensuring that any abrogation of their Eleventh Amendment immunity comports with the constitutional framework for such action. Because the decision of the Court of Appeals in this case departed from this Court's now well-established precedent for determining when Congress may properly abrogate the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment, the *amici* States have an interest in seeing the Ninth Circuit's error promptly corrected.

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[1] *See* Governments Div., U.S. Census Bureau, *Government Employment March 2000* 1 (2002), http://www.census.gov/govs/apes/00emppub.pdf. As its title suggests, figures cited from *Government Employment March 2000* are based on data collected for the month of March 2000.

SUMMARY OF ARGUMENT

The holding of the Court of Appeals for the Ninth Circuit in this case—that Congress validly abrogated the States' Eleventh Amendment immunity from suits under the "family leave" provision of the Family and Medical Leave Act of 1993—creates a conflict with the Fifth and Sixth Circuits and rejects the reasoning of six other circuits and a State supreme court. The Ninth Circuit erred because Congress was not attempting to remedy a pattern of unconstitutional State conduct by enacting the FMLA. Congress identified no such pattern of conduct. In fact, Congress specifically documented and highlighted the fact that most States were ahead of the Federal Government in addressing the family and medical leave needs of their employees. Congress cited the Equal Protection Clause of the Fourteenth Amendment as a justification for its own approach to leave issues, but it never accused the States of violating their obligations under the Constitution.

The Ninth Circuit's burden-shifting framework for analyzing abrogation under Section 5 of the Fourteenth Amendment for statutes purportedly enacted to remedy sex discrimination was also erroneous. That framework is not only inconsistent with the analysis employed by this Court in *Kimel* v. *Florida Board of Regents* and *Board of Trustees of University of Alabama* v. *Garrett*, which involved statutes enacted to address age and disability discrimination. It is also inconsistent with this Court's decision in *United States* v. *Morrison*, which involved a statute passed to address sex discrimination, and this Court's decisions upholding the Voting Rights Act of 1965, which was passed to address racial discrimination in voting. The Court of Appeals' decision directly impacts nearly one-fifth of the State government employees in the United States, and this Court should not wait to correct the Ninth Circuit's error in this case.

ARGUMENT

In this case, the Court of Appeals for the Ninth Circuit held that the "family leave" provision of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000) ("FMLA"), validly abrogated the States' Eleventh Amendment immunity from suit. Pet. App. at 18a, 20a, 42a. As Petitioners correctly explain, this ruling creates a direct conflict with the decisions of the Fifth Circuit in *Kazmier* v. *Widmann*, 225 F.3d 519, 526 (5th Cir. 2000), and the Sixth Circuit in *Thomson* v. *Ohio State University Hospital*, 238 F.3d 424, 2000 WL 1721038 (6th Cir. 2000) (*per curiam*) (unpublished opinion).[2] Both cases held that Congress did not validly abrogate the States' immunity from suit in enacting the "family leave" provision, 29 U.S.C. § 2612(a)(1)(C).

The Ninth Circuit's ruling also rejects the reasoning of six other circuits that have addressed abrogation of State immunity under the FMLA. *See Laro* v. *New Hampshire*, 259 F.3d 1, 13 (1st Cir. 2001); *Lizzi* v. *Alexander*, 255 F.3d 128, 134–36 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel* v. *Missouri*, 233 F.3d 1094, 1095 (8th Cir. 2000); *Chittister* v. *Dep't of Community & Econ. Dev.*, 226 F.3d 223, 228 (3d Cir. 2000); *Sims* v. *Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale* v. *Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Garrett* v. *Univ. of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1219 (11th Cir. 1999), *rev'd in part on other grounds sub nom. Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2000); *see also Schall* v. *Wichita State Univ.*, 269 Kan. 456, 477–81, 7 P.3d 1144, 1160–62 (2000).

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[2] The Sixth Circuit permits citation of its unpublished decisions "[i]f a party believes . . . that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well . . . ." 6th Cir. R. 28(g).

The *amici* States agree with the Petitioners that the Court should grant certiorari to review the decision of the Ninth Circuit. *Amici* endorse the Petitioners' cogent petition for writ of certiorari and would also draw this Court's attention to two significant errors in the Ninth Circuit's opinion: the Ninth Circuit's erroneous analysis of legislative history of the FMLA, and the faulty burden-shifting framework the court used to analyze abrogation under Section 5 of the Fourteenth Amendment.

I. CONGRESS WAS NOT REMEDYING UNCONSTITUTIONAL STATE CONDUCT WITH THE FMLA.

This Court has held that for Congress to invoke its enforcement authority under Section 5, "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). The congressional findings that support the FMLA, 29 U.S.C. § 2601(a), include no mention of State conduct or policies that Congress believed were in violation of the Fourteenth Amendment; indeed, State governments are not mentioned in Congress's findings at all. *See id.* As the Fourth Circuit observed in *Lizzi*, "Congress did not identify . . . *any* pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care." 255 F.3d at 135 (emphasis added).

A. Congress Did Not Identify a Pattern of Unconstitutional State Conduct in Enacting the FMLA.

The Ninth Circuit held that Congress had identified a pattern of unconstitutional State conduct by pointing to two documents among the "snippets from legislative

hearings concerning earlier versions of the FMLA," *Sims*, 219 F.3d at 563, submitted by the United States. The first document was a 1990 Bureau of Labor Statistics ("BLS") survey cited in the Senate Report on the FMLA, which "found that 37 percent of surveyed private-sector employees were covered by 'maternity' leave policies, while only 18 percent were covered by 'paternity' leave policies." Pet. App. at 20a (citing S. Rep. No. 103-3, at 14–15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 17). The second document was the transcript of a congressional committee hearing held in 1986 in which a witness testified that a "survey of the private and public sectors done by the Yale Bush Center Infant Care Leave Project revealed that '[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.'" Pet. App. at 20a–21a (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the Committee on Education and Labor*, 99th Cong. 33 (1986) (prepared statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project), and citing *id.* at 29–30 (testimony of Meryl Frank)). The Court of Appeals concluded that, when "[t]aken together, the BLS and Yale Bush Center surveys constitute substantial evidence of *unconstitutional* state-sponsored gender discrimination in leave policies for state employees." Pet. App. at 21a (emphasis added).

This conclusion is flawed for several reasons. First, the Court of Appeals assumed that any disparity in the availability of maternity and paternity leave in the public sector was the result of *unconstitutionally* disparate leave policies for men and women. *See id.* The disparity between the availability of maternity and paternity leave, however, was more likely the result of policies meant to account for "actual physical disability on account of

pregnancy, childbirth, or related medical conditions," which this Court upheld under Title VII in *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 290 (1987) (emphasis removed).[3] In *Guerra*, this Court reasoned that the Pregnancy Discrimination Act[4] amendments to Title VII were "not intended to prohibit all employment practices that favor pregnant women," *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 218 n.6 (1991) (White, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in part and concurring in judgment) (citing *Guerra*, 479 U.S. at 284–90), especially where the practice was tied not to stereotypical notions but instead to actual physical disability due to pregnancy or childbirth. *Guerra*, 479 U.S. at 290; *see also Geduldig* v. *Aiello*, 417 U.S. 484, 494–95 (1974) (holding that State disability insurance program that excluded from coverage disability due to normal pregnancy did not violate Equal Protection Clause). The disparity in leave availability could also have been the result of gender-neutral policies that varied from State to State or agency to agency.

Second, the Court of Appeals attributed the disparity to State governments, Pet. App. at 21a ("widespread *intentional* gender discrimination by states"), even though the 1986 testimony related to the entire "public sector." Local governments employ more than twice as many workers as State governments. *See Government Employment March 2000* at 1. Lumping States, which enjoy Eleventh Amendment immunity, together with counties and municipalities, which do not have such immunity, is inappropriate. *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368–69 (2001). Next, the court concluded—without support from the legislative record—that Congress could infer that this information regarding maternity and paternity leave translated into similar gender-based disparities regarding family leave. Pet. App. at 21a. Finally, by relying on it, the court apparently concluded that the information presented to the 99th Congress in 1986 regarding the similarities between patterns of leave availability in the public and private sectors was still valid seven years (and four Congresses) later when the FMLA was passed by the 103rd Congress in 1993.

It is doubtful that such an extended chain of questionable inferences could ever support a conclusion that there was some (unstated) congressional finding that State policies on family leave were unconstitutional. The chain crumbles, however, when confronted with the FMLA's actual legislative history regarding State family and medical leave policies.

B. The Legislative History of the FMLA Demonstrates That Most States Were Ahead of the Federal Government in Addressing Family Leave Issues.

Far from criticizing the States regarding their treatment of family leave issues, Congress expressly recognized that most States had already responded to their employees' leave needs by enacting some form of family or medical leave. In both the House and Senate Reports accompanying the FMLA, Congress included sections detailing progressive State laws on family leave issues:

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[3] *See, e.g.*, Cal. Gov't Code Ann. § 12945(b)(2) (West 1992 & Supp. 2002) (upheld in *Guerra*, requiring four months leave for female employees disabled because of pregnancy or childbirth); Alaska Stat. § 23.10.500(a) (2001) (providing same benefits to employee whose health is affected by pregnancy, childbirth, or related condition as granted to other employees with similar ability to work); Conn. Gen. Stat. Ann. § 46a-60(a)(7) (West 1995 & Supp. 2002) (requiring reasonable leave of absence for disability resulting from pregnancy).

[4] Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

FAMILY LEAVE LAWS IN THE STATES

Since Federal family leave legislation was first introduced, numerous States have begun to consider similar family leave initiatives. Approximately 30 States, the District of Columbia and Puerto Rico have adopted some form of family or medical leave.

California provides up to 16 weeks of leave over 2 years for the birth or adoption of a child, or for the serious health condition of a child, spouse, or parent. It applies to employers with 50 or more workers. California law also requires employers of five or more employees to provide women with a reasonable pregnancy disability leave of up to 4 months. Vermont provides 12 weeks of family and medical leave per year. Employers of 10 or more workers must provide leave to care for a newborn or newly adopted child; employers of 15 or more must also provide leave to care for the serious health condition of a worker's child, spouse, or parent, or for the worker's own serious health condition. The District of Columbia's law provides 16 weeks every 2 years for family leave, and a separate 16 weeks every 2 years for medical leave. Rhode Island's law provides 13 weeks of unpaid family and medical leave for birth, adoption or the serious illness of a family member and the worker's serious health condition. The Rhode Island law covers workers employed by firms of 50 or more. The Wisconsin law requires employers of 50 or more workers and the State government to grant up to 6 weeks of unpaid leave for the birth or adoption of a child, 2 weeks to care for a child, spouse or parent with a serious health condition, and 2 weeks of personal medical leave within a 12 month period. Oregon has enacted a law which

provides for 12 weeks of unpaid parental leave per child for childbirth or adoption for all workers employed by companies with 25 or more employees. Oregon has also enacted a family leave law that provides 12 weeks of leave every 2 years to care for a seriously ill parent or spouse or to care for a sick child for workers employed by companies of 50 or more. The law in Maine requires private employers and local governments having 25 or more employees and the State government to grant up to 8 weeks (over a 2 year period) of unpaid leave for birth, adoption, care of a family member with a serious illness or the employee's own serious illness. North Dakota's law covers State employees and provides 16 weeks of family leave per year for birth, adoption, illness of a spouse, child, or parent. Pennsylvania's law covers State employees and provides 6 months (24 weeks) of parental leave for the birth or adoption of a child. Puerto Rico guarantees 8 weeks paid pregnancy leave at half salary, which can be extended an additional 12 weeks in the event of complications. Puerto Rico's law applies to all employers, and all employees are eligible for coverage. Minnesota has a 6 week parental leave law for birth or adoption covering workers at firms with 21 or more employees.

These States join many others that have enacted laws or regulations protecting employees' right to some form of family or medical leave including Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, North Carolina, Oklahoma, Tennessee, Washington, and West Virginia.

S. Rep. 103-3, at 20–21, *reprinted in* 1993 U.S.C.C.A.N. at 22–23; *see also* H.R. Rep. 103-8(I), at 32–33 (1993) (similar language).

Many of the laws described in the Senate and House Reports provided greater benefits in some way than the FMLA—e.g., by providing longer leave periods (Pennsylvania), applying to private employers with fewer employees (Maine), or making paid leave available (Puerto Rico). This recitation of facts is more a ringing congressional endorsement of State conduct than an attempt to show a pattern of unconstitutional State behavior that required remedial action under Section 5 of the Fourteenth Amendment.

Moreover, Congress's list of States with "laws or regulations protecting employees' right to some form of family or medical leave" did not purport to be exhaustive, and the "Commission on Family and Medical Leave," which Congress created to study employee leave issues,[5] later found that the States' leave policies in 1993 were actually even a bit better than Congress had realized. According to the Commission, a total of 34 States plus the District of Columbia and Puerto Rico had adopted some form of family or medical leave by early 1993. Comm'n on Fam. & Med. Leave, U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 45 (1996), http://www.dol.gov/dol/esa/public/regs/compliance/whd/fmla/chap3.pdf. Of the 34 States with family or medical leave laws or regulations in 1993, all 34 covered State employees, while 23 "had leave laws covering both private and state employees." *Id.* at 46.

[5] *See* 29 U.S.C. §§ 2631–2633.

For this conclusion, the Commission relied in part on a Department of Labor Women's Bureau publication cataloguing the States' family and medical leave laws as of early 1993, which the Commission characterized as one of the sources of "[t]he most complete information on state laws" regarding family and medical leave prior to the FMLA. *Id.* at 45–46 & nn.33, 34. The Women's Bureau publication suggested, moreover, that even the figure of 34 States was probably understated, because the Women's Bureau study was only "based on State *statutes*." Women's Bureau, U.S. Dep't of Labor, *State Maternity/Family Leave Law* 1 n.1 (1993) (emphasis added) (on file with Law Library of Congress). The study noted that "[s]ome States may provide comparable leave to State and other public employees through personnel codes, policy, practice, executive order, or management directive." *Id.* Thus, by the time Congress enacted the FMLA in 1993, *at least* 34 States, Puerto Rico, and the District of Columbia had already addressed the family or medical leave needs of State employees.

C. Congress Cited the Equal Protection Clause as Justification for Its Own Approach to Leave Issues, Not as the Basis for Remedial Legislation.

Of course, Congress did refer to the Equal Protection Clause of the Fourteenth Amendment in the FMLA. *See* 29 U.S.C. § 2601(b)(4), (5). The question is, however, "What did Congress mean by that reference?" In answering this question, it first bears noting that the reference to equal protection is not found in the statement of congressional "Findings," but in the statement of congressional "Purposes." Congress set forth those purposes in 29 U.S.C. § 2601(b):

It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

. . . .

(4) *to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis*; and

(5) *to promote the goal of equal employment opportunity for women and men, pursuant to such clause.*

29 U.S.C. § 2601(b) (emphasis added).

Here, again, there is no statement—express or implied—that the States had engaged in conduct that violated the Fourteenth Amendment. Instead, Congress was making clear that it intended its *own* approach to family and medical leave to comply with the principle of equal protection and equal employment opportunity. In other words, Congress was clarifying that it had designed the FMLA to avoid the risk of *causing* equal protection violations. Congress did not suggest, however, that the States (or local governments, for that matter) had failed

to uphold their constitutional obligations in addressing family or medical leave issues in the past. *See Sims*, 219 F.3d at 564–65 ("At best, Congress sought to 'minimize[] the *potential* for employment discrimination on the basis of sex.'") (quoting *Florida Prepaid*, 527 U.S. at 641). Thus, the references to the Equal Protection Clause in the FMLA do not support a conclusion that the Act was adopted as remedial enforcement legislation under Section 5 of the Fourteenth Amendment.[6]

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[6] The Senate and House reports confirm that Congress did not view the FMLA as remedying unconstitutional State conduct. In those reports, Congress expressed concern about enacting a leave provision for only one sex or group of employees. Thus, Congress drafted the FMLA so that it would

> address[] the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition.
>
> *A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. S. 5, by addressing the needs of all workers, avoids such a risk.*
>
> Thus S. 5 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment.

S. Rep. 103-3, at 16 (emphasis added), *reprinted in* 1993 U.S.C.C.A.N. at 18; *see also* H.R. Rep. 103-8(I), at 29 (similar language). Thus, Congress was attempting to uphold its *own* obligation to avoid *causing* violations of equal protection or due process while exercising its Commerce Clause powers to address leave issues and impose leave obligations on State actors. *See* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; *Vance* v. *Bradley*, 440 U.S. 93, 94 n.1 (1979) ("[T]he Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws."). Congress never accused the States of violating their obligations under the Fourteenth Amendment, however. *See Sims*, 219 F.3d at 564 ("These passages [from the 1993 House Reports] seek to justify the FMLA's provision of leave to all covered employees on the basis of the potential for gender-related discrimination. They do not suggest, however, that Congress

II. THE COURT OF APPEALS EMPLOYED AN ERRONEOUS BURDEN-SHIFTING ANALYSIS FOR SECTION 5 ENFORCEMENT LEGISLATION.

Under this Court's Section 5 jurisprudence, "[t]he first step" in the analysis "is to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Next, having "determined the metes and bounds of the constitutional right in question," the Court "examine[s] whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States . . . ." *Id.* at 368; *Kimel*, 528 U.S. at 89. Finally, the Court determines whether the remedy or remedies chosen by Congress are congruent and proportional to the constitutional injury it identified. *Garrett*, 531 U.S. at 372; *see City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

The Ninth Circuit reasoned that the heightened scrutiny applicable to sex discrimination claims[7] distinguished this case from *Kimel* and *Garrett*, which involved classifications based on age and disability subject to rational-basis scrutiny. Pet. App. at 14a, 17a. When a gender-based classification is challenged, the burden of satisfying the standard of intermediate scrutiny rests with the State. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). With rational-basis scrutiny, the burden rests on the party challenging the classification "to negative

---

was responding to a pattern of actual discrimination on the part of the States.").

[7] *See Nguyen* v. *INS*, 533 U.S. 33 (2001); *United States* v. *Virginia*, 518 U.S. 515, 533 (1996); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

'"any reasonably conceivable state of facts that could provide a rational basis for the classification."'" *Garrett*, 531 U.S. at 367 (quoting *Heller* v. *Doe*, 509 U.S. 312, 320 (1993), in turn quoting *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The Court of Appeals observed that the burden of proof placed on the State under intermediate scrutiny "has the effect of creating a rebuttable presumption of unconstitutionality for state-sponsored gender discrimination." Pet. App. at 14a.

The Court of Appeals contrasted its "presumption of unconstitutionality" for sex-based classifications with classifications based on age and disability such as those at issue in *Kimel* and *Garrett*. "In effect," the court reasoned, in those cases "the relevant provisions of the ADA and the ADEA were subject to a *presumption of unconstitutionality*—the burden was on the defenders of the legislation to prove that it was valid under section 5." Pet. App. at 17a. The Court of Appeals stated that, "[w]hile the creation of such a presumption might appear extraordinary and incongruous, it makes sense in light of the Court's emphasis on the fact that state-sponsored age and disability discrimination is *not* subject to heightened scrutiny. The presumption of unconstitutionality applied to the ADA and the ADEA thus is merely the flip side of the presumption of constitutionality that is accorded to state-sponsored age and disability discrimination." *Id.* Pet. App. at 17a. The Court of Appeals then concluded that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, section 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional. That is, the burden is on the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct." Pet. App. at 18a (footnote omitted).

The Ninth Circuit's shifting presumptions for Section 5 analysis are inconsistent with this Court's precedent.

First, the "presumption of unconstitutionality" that the Ninth Circuit claims was applied in *Kimel* and in *Garrett* does indeed "appear extraordinary and incongruous"—but principally because there is no such presumption, and this Court did not employ such a presumption in either case. Rather, as the Court stated in *United States* v. *Morrison*, congressional enactments enjoy a "presumption of constitutionality" and will be invalidated "only upon a plain showing that Congress has exceeded its constitutional bounds." 529 U.S. 598, 607 (2000); *see also United States* v. *Harris*, 106 U.S. 629, 635 (1883). The opinions of this Court in both *Kimel* and *Garrett* show that Congress failed to identify a pattern of unconstitutional conduct by the States with respect to age or disability discrimination, and that Congress's remedies were disproportionate. *Garrett*, 531 U.S. at 368, 372; *Kimel*, 528 U.S. at 89, 86. Neither act was presumed unconstitutional; they were both *proven* unconstitutional.

Second, requiring "the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct," improperly allows a court to *presume* unconstitutional conduct and then forces the challenger to attempt the always difficult task of proving a negative. *See, e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 218 ("[I]t is never easy to prove a negative."). The Court of Appeals justified this remarkable burden because the FMLA was intended to address sex discrimination, which receives intermediate scrutiny. As Petitioners explain, however, Pet. at 18–19, this Court analyzed Section 5 enforcement legislation addressing sex discrimination in *Morrison*, and imposed no such burden of proving a negative, instead looking to the legislative record to see what Congress had actually found. *See* 529 U.S. at 626 (noting "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States").

The Court similarly did not presume unconstitutional behavior in analyzing the Voting Rights Act of 1965, but instead looked to the substantial record Congress assembled of unconstitutional State discrimination in the context of voting rights. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 310–15 (1966). When Congress later failed to assemble a record of unconstitutional State conduct in support of lowering the voting age to 18 in State and local elections in the Voting Rights Act of 1970, this Court held that Congress had exceeded its authority under Section 5. *See Oregon* v. *Mitchell*, 400 U.S. 112, 130 (1970) (opinion of Black, J.); *id.* at 212–13 (Harlan, J., concurring in part and dissenting in part); *id.* at 293–94 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part); *see also City of Boerne*, 521 U.S. at 530–31 (examining legislative record in case involving Free Exercise Clause of First Amendment).

Finally, the Court of Appeals' review of historical sex discrimination, Pet. App. at 23a–42a, raised its inquiry to a level of abstraction that rendered it ineffective as an analytical tool. It allowed the court to presume current unconstitutional behavior based on past (and in many instances, long past) behavior. It also permitted the court to cite past stereotypes generally to justify specific new requirements under Section 5 that substantively rewrite the underlying constitutional guarantee. *Cf. City of Boerne*, 521 U.S. at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."). Although history may provide a basic framework threshold for further analysis of State conduct, history *alone* is not sufficient to demonstrate a *current* pattern of unconstitutional behavior. The Ninth Circuit's approach mistakenly directs attention away from more recent and

current State conduct, leading to other errors, such as ignoring the 34 States that had already enacted family or medical leave laws for their employees by the time Congress enacted the FMLA. *See* § I(B), *supra*.

The Court of Appeals' substantial departures from "the[] now familiar principles" for analyzing congressional abrogation under Section 5 led it to conclude that the FMLA's family leave provision, 29 U.S.C. § 2612(a)(1)(C), was appropriate Section 5 enforcement legislation. Under this Court's precedents, the family leave provision was neither congruent nor proportional to any constitutional injury identified by Congress. Thus, it was not appropriate Section 5 legislation.

III. THIS COURT SHOULD NOT WAIT TO RESOLVE THE CURRENT SPLIT IN THE CIRCUITS.

Given the importance of the issue presented and the number of States and persons directly affected by the decision of the Court of Appeals in this case, this Court should not wait to address the current split in the circuits. The nine States in the Ninth Circuit have more than 907,000 State employees.[8] Thus, the Court of Appeals' decision affects nearly one-fifth of the Nation's 4.8 million State employees.

Delay in addressing this issue is also unwarranted to allow other circuits to address the issue first. As Petitioners show, this Court has not hesitated to reverse

[8] *See Government Employment March 2000* at 3 (Alaska), 4 (Ariz.), 6 (Cal.), 13 (Haw.), 14 (Idaho), 28 (Mont.), 30 (Nev.), 39 (Or.), 49 (Wash.). Of this figure, over 617,000 are full-time employees, and over 289,000 are part-time employees. *See id.* A part-time employee working at least 25 hours per week, 50 weeks per year could be covered under the FMLA. *See* 29 U.S.C. § 2611(2)(A).

summarily such clearly erroneous applications of the law as in this case. Pet. at 23. Moreover, the result in most other circuits is largely a foregone conclusion. The Fifth and Sixth Circuits have already directly addressed the family leave provision, 29 U.S.C. § 2612(a)(1)(C). The decisions of the Fourth Circuit in *Lizzi* and the Eighth Circuit in *Townsel* do not confine their reasoning to a particular subsection of the FMLA, and those courts are likely to regard the Ninth Circuit's approach as foreclosed by *Lizzi* and *Townsel*, much as the Sixth Circuit did in following *Sims* when confronted with the family leave provision in *Thomson*. This important issue merits immediate attention.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Court of Appeals reversed.

Respectfully submitted,

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(5)

Supreme Court, U.S.
FILED

AUG 22 2002

OFFICE OF THE CLERK

No. 01-1368

IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

v.

WILLIAM HIBBS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Certiorari Granted June 24, 2002

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RELEVANT DOCKET ENTRIES

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
CASE NO. CV-N-98-00205-HDM-(PHA)

1.	4/20/98	Complaint with Jury Demand filed.
2.	5/20/98	Motion to Dismiss filed by Defendants.
3.	6/12/98	Opposition to Motion to Dismiss filed by Plaintiff.
4.	7/2/98	Reply in Support of Motion to Dismiss filed by Defendants.
5.	7/21/98	Order (Defendants' motion to dismiss is denied without prejudice to renew in the form of a motion for summary judgment upon the close of discovery).
6.	7/28/98	Answer filed by Defendants.
7.	3/29/99	Motion for Partial Summary Judgment filed by Plaintiff.
8.	3/29/99	Motion for Summary Judgment filed by Defendants.
9.	3/31/99	Errata to Motion for Partial Summary Judgment filed by Plaintiff.
10.	4/16/99	Opposition to Defendants' Motion for Summary Judgment filed by Plaintiff.
11.	4/16/99	Opposition to Plaintiff's Motion for Partial Summary Judgment filed by Defendants.

12.	4/30/99	Reply to Motion for Partial Summary Judgment filed by Plaintiff.
13.	4/30/99	Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment filed by Defendants.
14.	6/3/99	Minutes Proceedings.
15.	6/3/99	Judgment (in favor of Defendants against Plaintiff).
16.	6/15/99	Notice of Appeal.

BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
DOCKET NO. 99-16321

1.	6/24/99	Cause docketed and appearances of counsel entered.
2.	10/18/99	Appellant's Opening Brief filed.
3.	11/18/99	Appellees' Brief filed.
4.	10/16/00	Clerk's letter sent to Solicitor General re: constitutionality of federal statute affecting public interest.
5.	11/22/00	Brief of the United States received.
6.	11/22/00	Motion of the United States for Leave to Intervene filed.

7.	11/24/00	Appellees' Motion for Leave to Respond to Brief of the United States filed.
8.	11/28/00	Order (The motion of the United States to intervene as of Right to Defend the Constitutionality of a Federal Statute is granted and its brief is ordered filed).
9.	12/26/00	Appellees' Supplemental Brief filed.
10.	2/28/01	Appellees' letter of additional citations filed; served on February 23, 2001.
11.	3/30/01	Appellees' letter of additional authority dated March 28, 2001, received.
12.	4/4/01	Motion for Leave to File Supplemental Brief filed by the United States.
13.	4/4/01	United States Supplemental Brief received.
14.	4/5/01	Appellees' Opposition to Motion of the United States for Leave to File Supplemental Brief filed.
15.	4/6/01	Order (The motion of the United States for leave to file supplemental brief is granted and the supplemental brief is ordered filed).

16.	4/6/01	Supplemental Brief filed by the United States.
17.	4/6/01	Appellees' Opposition to Motion of United States to File Supplemental Brief or in the Alternative Leave to Response to Supplemental Brief moot.
18.	4/9/01	Cause argued and submitted.
19.	4/10/01	Order (The parties shall, and amicus United States may, file concurrent supplemental briefs on the *Ex parte Young* issue within 21 days of this order).
20.	4/19/01	Appellees' Supplemental Brief filed.
21.	5/1/01	Appellant's Supplemental Brief filed.
22.	5/1/01	Appellees' Supplemental Brief deficient. Counsel notified.
23.	5/1/01	Case deemed submitted.
24.	5/7/01	Appellees' Supplemental Brief filed.
25.	12/11/01	Opinion: Reversed and Remanded.
26.	12/26/01	Appellees' Motion to Stay Issuance of Mandate Pending Filing of Petition for Certiorari filed.
27.	1/3/02	Appellant's Opposition to Motion to Stay Issuance of Mandate filed.

28.	1/8/02	Order (Issuance of the mandate is stayed pending the filing of a petition for writ of certiorari in the Supreme Court).
29.	1/10/02	Appellees' Reply to Appellant's Opposition to Motion to Stay Issuance of Mandate filed.
30.	1/15/02	Order (To United States District Court per motion of Defendants-Appellees, issuance of mandate is stayed pending filing of a petition for writ of certiorari in Supreme Court. The stay is granted).
31.	3/25/02	Received notice from Supreme Court, petition for writ of certiorari filed.

[Filed April 20, 1998]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM HIBBS,

CV-N-98-00205-HDM (PHA)

Plaintiff

vs.

COMPLAINT
DEMAND FOR JURY TRIAL

The Department of Human Resources, State of Nevada, CHARLOTTE CRAWFORD, in her official capacity as the DIRECTOR OF THE HUMAN RESOURCES DIVISION of the STATE OF NEVADA, and NIKKI FIRPO, in her office capacity as the Supervisor of the Reno Welfare Department,

Defendants.

_____/

Plaintiff, for his complaint against the Defendants, and each of them, alleges:

JURISDICTION AND VENUE

1. Plaintiff invokes this Court's jurisdiction under 28 U.S.C., Sections 1331, 1334, & 1337 on the ground that this action arises under the Family Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*, the Fourteenth Amendment to the United States Constitution. Plaintiff invokes this Court's

jurisdiction under the Declaratory Judgment Act, 28 U.S.C., Sections 2201 and 2202. Plaintiff invokes the Court's pendent jurisdiction over the related State and contract claims.

2. The venue of this action is properly placed in the District of Nevada pursuant to 28. U.S.C., Section 1391 because Plaintiff's claim arises in this district.

PARTIES

3. Plaintiff is a citizen of the United States and resides in Virginia City, Storey County, Nevada.

4. The Division of Human Resources and the Welfare Department are divisions of the State and public agencies and the employer of the Plaintiff.

5. Charlotte Crawford is the Director of the Division of Human Resources, which is the agency within which the Welfare Department is administered.

6. Nikki Firpo is the Director of the Welfare Department in Washoe County and signed the letter of termination of Mr. Hibbs.

STATEMENT OF THE CASE

7. Plaintiff is a citizen of the United States and was employed by the State of Nevada, Department of Social Services as an Eligibility worker beginning February 6, 1995. In June 1997, Plaintiff was informed by a medical doctor and a psychiatrist that his wife would require full time care because of a serious medical condition. He was informed that this full time care would be required until her surgery which was scheduled in November 1997. Mr. Hibbs informed his employer on June 30, 1997, and was told that he would be given leave until the situation was resolved or until December 30, 1997. On October 22, 1997,

Mr. Hibbs was approved for another 200 hours of leave based upon his wife's continued serious illness. In November 6, 1997, he was informed that he was being terminated. He was denied a meaningful hearing and denied an appeal of this decision. His termination was effective on December 22, 1997. Mr. Hibbs was informed that he was terminated for failure to report to work.

8. On December 22, 1997, three days before Christmas, Mr. Hibbs was informed that he had been terminated by the State of Nevada. Mr. Hibbs believed that he was subject to termination but had the right to another hearing. The hearing he was provided was titled "pre-disciplinary hearing." He repeatedly asked if he could cure the reason for dismissal and return to work but was denied that opportunity and his dismissal was recommended. Believing that this administrative step was a recommendation for dismissal, Mr. Hibbs filed a grievance regarding the termination recommendation on January 7, 1998, pursuant to Nevada statute. On March 20, 1998, the Administrative Hearing Officer ("AHO") for the State of Nevada dismissed the appeal stating that he had no jurisdiction because Mr. Hibbs had failed to file his appeal within ten (10) days of the dismissal. Whereas, the Attorney General deemed the grievance filing the equivalent of an appeal, the Administrative Hearing Officer dismissed whatever efforts Mr. Hibbs had made to perfect is claim.

9. The Plaintiff brings this action, thus, because the Defendants have acted in derogation of the Family Medical Leave Act ("FMLA"), in derogation of his Fourteenth Amendment rights of substantive and procedural due process, which are applicable to the State of Nevada. The Plaintiff's pendent claims also include a violation of the Plaintiff's rights under the Constitution of the State of Nevada and violation of the Nevada Revised Statutes,

Section 284 *et seq.* The Defendant has also subjected the Plaintiff to the intentional infliction of emotional distress.

STATEMENT OF FACTS

10. On February 6, 1995, William Hibbs was hired by the Department of Human Resources, Division of Welfare, State of Nevada as a Social Worker.

11. Mr. Hibbs completed all the training required of him during his tenure in this position. He received commendations, awards, excellent evaluations, and no written reprimands from his supervisors.

12. In June 1997, Mr. Hibbs had been a full-time, permanent employee of the State of Nevada for more than twelve (12) months. Mr. Hibbs had worked at least 1,250 hours over the previous twelve (12) months, June 30, 1996, through July 1, 1997. The State of Nevada is a public agency as defined by the FMLA.

13. In June 1997, Mr. Hibbs made a request for leave based upon the serious illness of his wife and her need for full time care. This medical emergency was documented by letters from medical and psychiatric doctors familiar with Mrs. Hibbs' condition. These reports were submitted to the State of Nevada. No challenge was ever made by the State of Nevada to any of these medical reports. Monthly medical reports were submitted to the State of Nevada by Mr. Hibbs.

14. On June 23, 1997, the State of Nevada approved medical leave through December 31, 1997. Mr. Hibbs began his leave on July 29, 1997. Mr. Hibbs stated to his supervisor that he would return on January 5, 1998.

15. On or about the middle of October 1997, he was informed that he had to reapply for further leave. He was

also informed that his fellow employees would donate the time so that he could continue his leave. Over three hundred (300) hours were donated.

16. On October 22, 1997, Mr. Hibbs was approved by the State of Nevada Personnel Office for another two hundred (200) hours of catastrophic leave.

17. On November 6, 1997, Mr. Hibbs was directed by his supervisor to attend a meeting at her office to discuss his wife's condition, which he did and explained in detail the failed surgery at Stanford University, the prognosis, the rehabilitation for pain medication addiction, and the future corrective surgery to be accomplished in November 1997 in Arizona, and his intention to return to work on January 5, 1998, no matter the result of the surgery because funds would become available to pay for his wife's full time care. The memorandum of this meeting was published with the details of his wife's condition and the details of the award of the malpractice settlement to the Hibbs, all in blatant disregard of the Hibbs' right to privacy and a breach of the confidentiality of the employee-employer relationship.

18. On November 6, 1997, Mr. Hibbs' supervisor went to his home, again breaching his privacy and that of his family, and delivered a letter from the supervisor to Mr. Hibbs notifying him that his leave had been exhausted and that he had to report to work by November 12, 1997, or be terminated. His immediate supervisor was well aware of the fact that he had no full time care for his wife. When he asked why his leave had not been approved, his supervisor also stated to him that she had no authority to determine the status of his leave.

19. On November 13, 1997, the Supervisor again went to the Hibbs' family home to deliver another letter of

discipline. She stated that she knew of no reason that his request for leave had been denied.

20. On December 8, 1997, Mr. Hibbs was notified by his supervisor that she intended to terminate him. He again asked why his medical leave granted to him was not effective. He asked if he could return to work and cure the problem and he was refused. Mr. Hibbs was told he would be given a "pre-disciplinary hearing."

21. On December 19, 1997, Mr. Hibbs was told that his pre-disciplinary hearing would take place at the office of the Welfare Department. He again asked if he could return to work to cure the problem and he was told that he could not return to work.

22. On December 22, 1997, Mr. Hibbs was given a determination of dismissal that had been altered to change the date from December 19, 1997, the date of his pre-disciplinary hearing to December 22, 1997, the date of the alleged decision by the hearing officer.

23. On January 7, 1998, Mr. Hibbs filed a grievance with his supervisor as required by statute requesting the right to return to work and other requests for relief.

24. On January 8, 1998, the Attorney General representing the Welfare Department referred the grievance to the Hearing Officer stating it was not a grievance because the employee was terminated without an appeal. Mr. Hibbs relied upon the Attorney General's designation of his filing as an appeal.

25. On March 20, 1998, after motion practice by counsel for Mr. Hibbs and the Attorney General, the Administrative Hearing Officer ("AHO") dismissed the appeal with prejudice stating that the AHO lacked jurisdiction to hear

this matter because the filing was not in the form of an appeal, but filed as a grievance.

26. Mr. Hibbs has filed the case for violation of his rights under the FMLA and for denial of due process by the acts of the State of Nevada in all the procedural aspects of terminating his position as an employee.

FIRST CLAIM FOR RELIEF

(FMLA, 29 U.S.C. § 2601 *et seq.)*

27. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1-26

28. In July 29, 1997, Plaintiff began a leave of absence from his full time, permanent position with the State of Nevada to provide full time care for his spouse who had a serious medical condition.

29. Each month after he began his leave, Plaintiff furnished to the State of Nevada, Social Services Department, reports from doctors explaining the serious medical condition of Mr. Hibb's spouse and her need for full time care.

30. On November 6, 1997, Mr. Hibbs, at the request of his supervisor further described in detail the serious health condition of his spouse and why he had made arrangements so that he could return to work by January 5, 1998.

31. The letter from the State of Nevada approving his leave granted intermittent leave until December 30, 1997. The letter failed to designate the leave in quantity and assignment until Mr. Hibb's projected return in January of 1998.

32. Another letter dated October 22, 1997, granted Plaintiff another 200 hours of leave again failing to

designate the leave granted and the amount remaining and, therefore, denying Mr. Hibbs his entitlements under State and Federal law.

33. Plaintiff requested the use of his additional leave granted and was denied without reason and without an accounting and proper designation of his leave.

34. Plaintiff was terminated in retaliation for his request for leave.

35. The State of Nevada has failed to properly account for and notify Mr. Hibbs of the means to use FMLA leave in conjunction with leave provided by statute in Nevada as required by State and federal law. The State of Nevada failed to properly account for Mr. Hibbs' leave and failed to inform Mr. Hibbs of the appropriate designation of his leave. The State failed to give Mr. Hibbs notice of leave and the use of leave and failed to include such notice in his personnel file as required by the FMLA and by State statute.

36. Plaintiff has been required to retain counsel to prosecute the claims against Defendants herein and is entitled to his attorneys fees and costs.

37. Plaintiff has suffered hardship and damages due to his termination according to proof at trial.

SECOND CLAIM FOR RELIEF

(Violation of rights under Fourteenth Amendment)

38. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1–38.

30. Plaintiff was a permanent, classified, full-time employee of the State of Nevada pursuant to NRS, § 284.385.

40. He was entitled to a hearing pursuant to NRS § 284.390 and Mr. Hibbs was denied that hearing by the act of the AHO in dismissing his appeal with prejudice.

41. Mr. Hibbs attended a hearing termed "a pre-termination hearing" but was told that he had already been terminated. He was denied the right to review the documents and information upon which the State of Nevada used to terminate his employment. He was denied the right to review the documents used by the individual representing the State who determined that the termination was reasonable all in violation of State law and, therefore, a violation of Mr. Hibbs' due process rights under the United States Constitution.

42. Plaintiff has been required to retain counsel to prosecute the claims against the Defendants herein and is entitled to his attorneys fees and costs.

43. Mr. Hibbs has suffered hardship and damages due to the violation of his substantive and procedural due process rights to be shown by proof at trial.

THIRD CLAIM FOR RELIEF

(Violation of due process rights under State Constitution)

44. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1–43.

45. Plaintiff was deprived of his employment in which he has a property right without a hearing and without the documentation upon which the State of Nevada based its determination to terminate and upon which the State of Nevada determined that the termination was reasonable.

46. Plaintiff has been required to retain counsel to prosecute the claims against the Defendants herein and is entitled to his attorneys fees and costs.

47. Mr. Hibbs has suffered hardship and damages for this denial of his State constitutional rights to be shown by proof at trial.

FOURTH CLAIM FOR RELIEF

(Violation of rights granted by Statute in the State of Nevada, Chapter 284)

48. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1 through 47.

49. Full-time employees' leave status is determined by the interpretation of Chapter 284 as found in Nevada Administrative Code (NAC) 284. Mr. Hibbs was caring for a family member as provided in NAC 284.558 with a serious health condition as provided in NAC 284.5239. Mr. Hibbs met the requirements of NAC 284.576 and was granted leave through December 1997. He reported that he would return to work on January 5, 1998. He was granted 200 more hours of leave on October 22, 1997, that further extended his leave. He advised his supervisor on November 6, 1997, that he would return to work on January 5, 1998.

50. The State of Nevada failed to maintain accurate records and make an accounting to Mr. Hibbs' of his leave during the period of his leave in violation of NAC 284.5813.

51. The State of Nevada failed to return Mr. Hibbs' to his position in violation of NAC 284.5815.

52. In connection with the termination of Plaintiff's employment, Plaintiff further alleges that Defendants failed to act in compliance with its own written adopted policies as set out in the Nevada Administrative Code and failed in its termination of Plaintiff to act in good faith and with fair dealing toward Plaintiff.

53. Plaintiff has been required to retain counsel to prosecute the claims against Defendants herein and is entitled to his attorneys fees and costs.

54. Plaintiff suffered hardship and damages as will be shown according to proof at trial.

FIFTH CLAIM FOR RELIEF

(Intentional Infliction of Emotional Distress)

55. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1 through 54.

56. Defendants knew the circumstances of Plaintiff's request for leave was the serious health condition of his wife. Defendants knew that the Plaintiff's wife had to have further surgery to correct the serious health condition. Defendants knew that the Plaintiff's wife was scheduled for that surgery in November 1997. Defendants knew Plaintiff had stated he would return to work on January 5, 1998. Knowing these facts, Defendants chose to unlawfully terminate Plaintiff from his position in blatant disregard for the circumstances and the State's own adopted policy and law.

57. Defendants continued to violate Plaintiff's rights by denying him a hearing and terminate his position three days before the Christmas holiday.

58. Plaintiff has been required to retain counsel to prosecute the claims against Defendants herein and is entitled to his attorney's fees and costs.

59. Plaintiff has suffered emotional distress, hardship and damages that will be shown according to proof at trial.

SIXTH CLAIM FOR RELIEF

(Declaratory Relief)

60. Plaintiff restates and incorporates by reference as if fully set out herein paragraphs 1–59.

61. A controversy has arisen in which the Plaintiff's rights have been violated and a declaration of that violation by the Court is sought.

WHEREFORE, Plaintiff prays this Court enter an order providing as follows:

1. For back pay due and owing to Plaintiff for the wrongful termination in excess of TEN THOUSAND DOLLARS ($10,000.00);

2. For general damages in excess of TEN THOUSAND DOLLARS ($10,000.00);

3. That a declaratory judgment be issued that Plaintiff's rights have been violated as alleged above;

4. That Plaintiff be reinstated in his prior position or an equivalent position with all benefits retroactively made available;

5. That Plaintiff have and recover from the Defendants, jointly and severally, compensatory damages, liquidated, exemplary, punitive damages and such other monetary relief as may be deemed appropriate in amounts to be determined at trial;

6. That Plaintiff recover from Defendants, jointly and severally, prejudgment interest to the maximum extent permitted by law;

7. That Plaintiff recover from the Defendants, jointly and severally, his costs, including reasonable attorneys'

fees, together with such other remedies as may be provided by law;

8. Pursuant to Federal Rules of Civil Procedure, Rule 38, Plaintiff demands a trial by jury on all issues of fact in this action;

9. That the Court grant such other and further relief as it deems just and proper.

DATED this 20th day of April 1998.

ZEH, POLAHA, SPOO, HEARNE &
PICKER

By: /s/ Treva J. Hearne
TREVA HEARNE
Nevada Bar #4450
Attorneys for Plaintiff
575 Forest Street
Reno, Nevada 89509

STATE OF NEVADA)
) SS
COUNTY OF WASHOE)

WILLIAM HIBBS hereby affirms, under penalty of perjury, that the assertions of this affidavit are true;

That is the Plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and, as to those matters, he believes them to be true.

/s/ Willaim Hibbs
WILLIAM HIBBS

Subscribed and sworn to before me

this 20th day of April, 1998.

/s/ Carol Elewski
Notary Public

[Filed July 28, 1998]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM HIBBS,	)
	) **CV-N-98-00205-**
	) **HDM-(PHA)**
Plaintiff,	)
	)
vs.	)
	) **ANSWER**
The Department of Human Resources, State of Nevada, CHARLOTTE CRAWFORD, in her official capacity as the DIRECTOR of the HUMAN RESOURCES DIVISION of the STATE OF NEVADA, and NIKKI FIRPO, in her official capacity as the Supervisor of the Reno Welfare Department,	)
Defendants.	)

Defendants, STATE OF NEVADA, ex. rel. its DEPARTMENT OF HUMAN RESOURCES, CHARLOTTE CRAWFORD, and NIKKI FIRPO, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, hereby answers the Complaint in the above-captioned matter as follows:

JURISDICTION AND VENUE

1. Admit.

2. Admit.

PARTIES

3. Admit.

4. It is admitted that the Department of Human Resources and its Welfare Division are agencies of the State of Nevada and that the Plaintiff was employed by the Welfare Division. All other material allegations are denied.

5. It is admitted that Defendant Charlotte Crawford is the Director of the Department of Human Resources and that the Welfare Division is a division of the Department of Human Resources. All other material allegations are denied.

6. It is admitted that Defendant Nikki Firpo is employed by the Welfare Division as a Social Welfare Manager IV and is the manager of the Reno District Office of the Welfare Division. All other material allegations are denied.

STATEMENT OF THE CASE

7. It is admitted that Plaintiff began working for the Welfare Division as an Eligibility Certification Specialist on or about February 6, 1995. Defendants are without sufficient knowledge or information to either admit or deny allegations regarding what Plaintiff was told by medical and psychiatric professionals regarding his wife's condition and deny those allegations on that basis. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical leave Act (FMLA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. It is admitted that Plaintiff's termination was effective December 22, 1997. It is admitted that Plaintiff was terminated from his position with the Welfare Division because he violated various provisions of the Nevada Administrative Code (NAC) and the

Department of Human Resources Prohibitions and Penalties that stemmed from his absence from his job without leave. All other material allegations are denied.

8. It is admitted that Plaintiff was given his final notice of termination on December 22, 1997. Defendants are without sufficient knowledge or information to either admit or deny allegations regarding what Plaintiff believed, and deny those allegations on that basis. It is admitted that Plaintiff was provided with a Pre-Disciplinary Hearing. It is admitted that Plaintiff, through his attorney, filed a grievance on January 7, 1998. It is admitted that on March 20, 1998, Plaintiff's appeal before the Nevada Personnel Commission of his termination was dismissed for "want of subject matter jurisdiction." All other material allegations are denied.

9. Denied.

STATEMENT OF FACTS

10. It is admitted that Plaintiff began working for the Welfare Division as an Eligibility Certification Specialist on or about February 6, 1995. All other material allegations are denied.

11. It is admitted that Plaintiff completed all the training that he was assigned during his tenure with the Welfare Division. Defendants are presently without sufficient information or knowledge to either admit or deny whether Plaintiff received commendations, awards, or excellent evaluations, and deny these allegations on that basis. All other material allegations are denied.

12. It is admitted that Plaintiff began working for the Welfare Division as an Eligibility Certification Specialist on or about February 6, 1995. Defendants are presently without sufficient information or knowledge to either admit

or deny whether Plaintiff worked at least 1,250 hours between June 30, 1996 and July 1, 1997, and deny these allegations on that basis. It is admitted that the State of Nevada is a public agency as defined in 29 U.S.C. § 203(x). All other material allegations are denied.

13. It is admitted that prior to June 23, 1997, a Request for Family or Medical Leave on behalf of Plaintiff was lodged with the Welfare Division, and that this request was because of a serious health condition affecting Plaintiff's spouse. It is admitted that on or about October 17, 1997, several medical reports concerning Plaintiff's spouse were received by the Welfare Division. All other material allegations are denied.

14. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical Leave Act (FLMA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. It is admitted that on at least one occasion Plaintiff stated that he did not intend to return to work until January 5, 1998. All other material allegations are denied.

15. It is admitted that on or about the middle of October, 1997, Plaintiff was informed that as of October 1, 1997, he had exhausted his 12 weeks of FMLA and was asked whether he wanted to return to work or to request additional catastrophic leave. All other material allegations are denied.

16. It is admitted that on or about October 21, 1997, Plaintiff's request for 200 additional hours of catastrophic leave was approved by the Welfare Division and forward to the Department of Human Resources for approval by the Director and that on or about November 5, 1997, the request was returned to the Welfare Division without being

approved by the Director. All other material allegations are denied.

17. It is admitted that early in the day on November 3, 1997, Plaintiff called the Welfare Division's Reno District Office regarding setting up a meeting regarding his job status and an update of his wife's medical condition. It is admitted that this meeting took place on November 3, 1997, at 350 South Center Street, Suite 260 at approximately 1:15 p.m. It is admitted that Plaintiff's wife's medical condition and future treatment needs were discussed. It is admitted that Plaintiff stated he thought ideally he would be able to return to work by January 5, 1998. All other material allegations are denied.

18. It is admitted that on November 6, 1997, Defendant Nikki Firpo hand delivered a Letter of Instruction dated November 6, 1997 to Plaintiff's home directing him to report for work by November 12, 1997, and that a failure to do so would result on disciplinary action. All other material allegations are denied.

19. It is admitted that on November 13, 1997, Defendant Nikki Firpo hand delivered a Written Reprimand to Plaintiff's home for failing to report to work on November 12, 1997, along with a written request for him to return to work immediately. All other material allegations are denied.

20. It is admitted that on December 8, 1997, Plaintiff was served with a Specificity of Charges in which the recommended discipline was termination. It is admitted that Plaintiff was told he would be given a pre-disciplinary hearing. All other material allegations are denied.

21. It is admitted that Plaintiff's pre-disciplinary hearing was scheduled and held on December 19, 1997. All other material allegations are denied.

22. It is admitted that Plaintiff was given his final notice of termination on December 22, 1998. All other material allegations are denied.

23. It is admitted that Plaintiff, through his attorney, filed a grievance on January 7, 1998. All other material allegations are denied.

24. It is admitted that on January 8, 1998, the undersigned counsel stated in a letter to Plaintiff's counsel that "I will not be responding to the allegations in Mr. Hibbs' grievance because only permanent employees may utilize the grievance procedure. *See* NAC 284.658. Mr. Hibbs is no longer a permanent employee and can no longer file grievances. Accordingly, the relief sought in the grievance is denied." . . . "However, your January 7, 1998 letter and grievance will be construed as an appeal of the December 19, 1997 hearing, and will be forwarded to the Nevada Department of Personnel for their consideration and action." Defendants are presently without sufficient knowledge or information to either admit or deny allegations regarding to what Plaintiff relied upon regarding the filing of his personnel appeal. All other material allegations are denied.

25. It is admitted that on March 20, 1998, Plaintiff's appeal before the Nevada Personnel Commission of his termination was dismissed for "want of subject matter jurisdiction." All other material allegations are denied.

26. Denied.

FIRST CLAIM FOR RELIEF

FMLA, 29 U.S.C. § 2601, *et seq.*)

27. Defendants restate and incorporate by reference as is set forth in their entirety paragraphs 1-26 of their Answer.

28. It is admitted that after July 29, 1997, Plaintiff did not again work full time for the Welfare Division. Defendants are presently without sufficient information or knowledge to either admit or deny the reason why Plaintiff remained away from his position at the Welfare Division after July 29, 1997, and deny those allegations on that basis. All other material allegations are denied.

29. It is denied that Plaintiff furnished the Welfare Division with medical reports concerning his wife on a monthly basis. It is admitted that Plaintiff intermittently furnished the Welfare Division with medical reports concerning his wife. All other material allegations are denied.

30. Denied.

31. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical Leave Act (FLMA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. All other material allegations are denied.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

SECOND CLAIM FOR RELIEF

(Violation of rights under Fourteenth Amendment)

38. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-37 of their Answer.

30. [sic] Admit.

40. It is admitted that Plaintiff was entitled to a post-termination hearing pursuant to NRS 284.390. All other material allegations are denied.

41. It is admitted that Plaintiff attended his pre-termination hearing on December 19, 1997. All other material allegations are denied.

42. Denied.

43. Denied.

THIRD CLAIM FOR RELIEF

(Violation of due process rights under State Constitution)

44. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-43 of their Answer.

45. Denied.

46. Denied.

47. Denied.

FOURTH CLAIM FOR RELIEF

(Violation of rights granted by Statute in the State of Nevada, Chapter 284)

48. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-47 of their Answer.

49. It is admitted that NRS 284 and NAC 284 address the leave status of State employees. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical Leave Act (FMLA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. It is admitted that Plaintiff was granted approximately 378 hours of catastrophic leave donated from other employees of the Welfare Division. It is admitted that from January 1, 1997, through November 30, 1997, Plaintiff was absent from his job a total of approximately 921.25 hours. It is admitted that on at least one occasion Plaintiff stated that he did not intend to return to work until January 5, 1998. All other material allegations are denied.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

FIFTH CLAIM FOR RELIEF

(Intentional Infliction of Emotional Distress)

55. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-54 of their Answer.

56. It is admitted that Plaintiff informed the Welfare Division that he was requesting leave to care for his seriously ill spouse and that on at least one occasion Plaintiff informed the Welfare Division that his spouse was scheduled for surgery in November, 1997. It is admitted that on or about June 23, 1997, Plaintiff was notified that his request for leave pursuant to the Family Medical Leave Act (FMLA) had been approved, and that a total of 480 hours of leave was granted to be used intermittently between May 1, 1997 and December 31, 1997. It is admitted that on at least one occasion Plaintiff stated that he did not intend to return to work until January 5, 1998. All other material allegations are denied.

57. It is admitted that Plaintiff was given his final notice of termination on December 22, 1997. All other material allegations are denied.

58. Denied.

59. Denied.

SIXTH CLAIM FOR RELIEF

(Declaratory Relief)

60. Defendants restate and incorporate by reference as if set forth in their entirety paragraphs 1-59 of their Answer.

61. Denied.

AFFIRMATIVE DEFENSES

1. The plaintiff's complaint fails to state a claim upon which relief can be granted.

2. Defendants at all relevant times acted in good faith toward plaintiff. Therefore, defendants are entitled to qualified good faith immunity from damages.

3. Defendants are immune from liability as a matter of law.

4. Defendants acted at all relevant times in accordance with applicable law and procedures which are constitutionally required.

5. Plaintiff's damages, if any, are the result of his own intentional and/or negligent acts and he is solely responsible for the matters alleged.

6. The negligence of the plaintiff caused or contributed to any injuries or damages which plaintiff may have sustained, and the negligence of these defendants, if any, requires that the damages of plaintiff be denied or diminished in proportion to the amount of negligence attributable to plaintiff.

7. Fairness and constitutional due process require that punitive liability and damages be proven by clear and convincing evidence.

8. Punitive damages, if any are awarded, must be reduced by reason of any fault of plaintiff and the circumstances under which this action arose.

9. The plaintiff has failed to mitigate his losses and damages, if any there were.

10. Any and all claims which occurred prior to two (2) years of the filing of plaintiff's complaint are barred by the statute of limitations.

11. This action against the Defendants is barred by the Eleventh Amendment to the United States Constitution. Also, the Defendants are entitled to sovereign immunity pursuant to Chapter 41 of the Nevada Revised Statutes.

12. Defendants cannot be sued while acting in their official capacity in a civil rights action.

13. Some or all of the named defendants were not personally involved and/or the cause and fact and proximate cause of plaintiff's alleged constitutional deprivations.

14. Plaintiff has not exhausted available administrative remedies.

15. Plaintiff's claims are barred by the doctrines of *collateral estoppel* and *res judicata*.

WHEREFORE, defendants pray as follows:

(1) That plaintiff take nothing by virtue of his complaint.

(2) That the defendants have judgment for their costs and attorney fees as determined by law.

(3) For such other and further relief as the Court may deem just and proper.

DATED this 28th day of July, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By /s/ Charles Hilsabeck
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(6)

Supreme Court, U.S.
FILED

AUG 22 2002

OFFICE OF THE CLERK

No. 01-1368

IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

v.

WILLIAM HIBBS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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87 pp

QUESTION PRESENTED

Whether 29 U.S.C. § 2612(a)(1)(C) exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 273 F.3d 844, and the district court's opinion (Pet. App. 48a-58a) is unreported.

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331. The court of appeals asserted jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on December 11, 2001. Petitioners filed their petition for writ of certiorari on March 11, 2002. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The relevant provisions of the Fourteenth Amendment to the United States Constitution provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The pertinent provision of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1), is as follows:

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Additional provisions of the FMLA that may aid the Court are set forth in the appendix to the petition for writ of certiorari. Pet. App. 61a-65a.

STATEMENT

Section 2612(a)(1)(C) of the FMLA does not validly abrogate the States' Eleventh Amendment immunity for at least two reasons. First, Congress was not legislating to remedy unconstitutional state conduct when it enacted the provision, and second, the provision does not remedy any

asserted unconstitutional conduct in a congruent and proportional manner.

In asserting its position, Nevada does not challenge the soundness of § 2612(a)(1)(C) or the FMLA generally. To the contrary, it embraces this labor standard as a means to strengthen families and the economy. Nevada does not stand alone in this regard. As Congress has recognized, at least thirty States had adopted family-care or medical leave policies by the time the FMLA was enacted. H.R. REP. NO. 103-8, at 32-33 (1993); S. REP. NO. 103-3, at 20-21 (1993).

The focus of this dispute is Congress's authority to regulate the employment policies of sovereign States, specifically whether Congress may authorize private suits for money damages against States that do not comply with federal leave policies. Under the American system of dual sovereignty, Congress's ability to exercise its constitutional powers is limited by the Tenth and Eleventh Amendments, which together preserve the inherent powers and dignity of the States. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Eleventh Amendment, in particular, guarantees that Congress cannot subject States to private suits for money damages except as part of a scheme enacted under Section 5 of the Fourteenth Amendment to remedy unconstitutional conduct. U.S. CONST. amend XI; U.S. CONST. amend XIV; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996). When it legislates under this Section 5 power, Congress can enact only those remedies that are congruent and proportional to the asserted unconstitutional conduct. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

Section 2612(a)(1)(C) cannot be justified as a remedy to unconstitutional discrimination. The States do not engage, and Congress has never suggested that they engage, in unconstitutional discrimination when granting family-care

leave to their employees. Therefore, regardless of the FMLA's value as a social policy, § 2612(a)(1)(C) is unconstitutional to the extent it authorizes suits against States in violation of the Eleventh Amendment.

This is not to say that state employees have no remedy if they are wrongly denied § 2612(a)(1)(C) leave. If States improperly deny FMLA leave, a state employee's rights can be vindicated through § 1983 and *Ex parte Young* suits, and actions may be filed against States by the Federal Government. *See* 29 U.S.C. §§ 2617(b)(2)-(3), (d); 42 U.S.C. § 1983; *Monroe v. Pape*, 365 U.S. 167, 171-85 (1961), *overruled in part by Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978); *Ex parte Young*, 209 U.S. 123 (1908). Finally, in some States, the employees may have a remedy under state law. Most States have family-care leave policies similar, if not superior, to the FMLA.

A. History Of State Leave Policies.

Demonstrating Justice Brandeis' belief that States serve as laboratories for social policy, the States have developed and implemented innovative family-care leave policies for over half a century. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

As documented by the State *amici*, States have long led the way in establishing gender-neutral family-care leave. Br. for *Amici* States 5-14. In 1945, at least sixteen States had sick leave policies pursuant to which employees could take paid sick leave to care for ill family members. *See Nelson v. Dean*, 168 P.2d 16, 20 (Cal. 1946); Br. for *Amici* States 6 n.3 (citing sixteen state policies discussed in

Nelson). By 1991, two years before § 2612(a)(1)(C) was enacted, these leave policies were so prevalent "the Office of Personnel Management (OPM) found that 46 State governments . . . allow[ed] use of sick leave for family illnesses." H.R. REP. NO. 103-722, at 2.

In addition, States have a history of establishing experimental leave programs like "catastrophic leave"—a leave donation program under which employees with unused paid leave may donate their leave entitlements to other employees. In 1989, Nevada adopted a catastrophic leave system. NEV. REV. STAT. 284.262. Numerous other States, including Alabama, Alaska, Kansas, Ohio and Oklahoma, have similar programs.[1]

Without a doubt, States have outperformed the Federal Government in providing family-care leave. Federal employees were authorized to use accrued sick leave as paid family-care leave only *after* the FMLA was passed. *See* Federal Employees Family Friendly Leave Act, Pub. L. No. 103-388, 108 Stat. 4079 (1994) (codified at 5 U.S.C. § 6307(e) (2000)). Federally-mandated leave, moreover, tends to be less generous than state family-care leave. The FMLA, for example, provides leave without pay for the care of a child, spouse, or parent, but many state policies provide *paid* leave for the care of *extended* family members. 29 U.S.C. § 2612(a)(1)(C); Br. for *Amici* States 7-8.

B. History Of Nevada's Leave Policies.

Like the majority of States, Nevada provides its employees the same, and in some instances more, leave than is required by § 2612(a)(1)(C). Like the FMLA, Nevada's

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[1] *See, e.g.*, ALA. ADMIN. CODE R 670-X-14-.04 (1991); ALASKA STAT. § 39.20.245 (2001); KAN. STAT. ANN. § 75-5549 (2001); OHIO ADMIN. CODE § 123:1-46-05 (2002); OKLA. STAT. tit. 74, § 840-2.23 (2002).

family-care leave policies have always been, and continue to be, gender neutral.

Nevada was one of the first States to provide the kind of leave at issue here—family-care leave. Since 1953, forty years before the FMLA was passed, Nevada public employees have been authorized to request leave without pay in order to care for a sick family member. *See* NEV. REV. STAT. 284.360(1). By 1973, a state employee could request from thirty days to one year of unpaid leave "for any satisfactory reason," including family-member care. Br. App. A-4-A-5. This provision, unlike the FMLA, defines "family" broadly to include extended family. *Id.* A-1-A-3. In 1984, these policies were codified in the Nevada Administrative Code at NEV. ADMIN. CODE § 284.578. Br. App. B-2-B-4. After the FMLA was enacted, Nevada adopted laws identical to the FMLA, thereby entitling state employees, as a matter of state law, to the benefits established in § 2612(a)(1)(C). NEV. ADMIN. CODE §§ 284.5234, 284.5811; NEV. REV. STAT. 284.360(5). Br. App. B-5-B-6. For the Court's convenience, these Nevada code provisions are set forth in the appendix to this Brief. *See* Br. App. A & B.

By 1973, Nevada's public employees were also authorized to use five days of *paid* sick leave per year to care for a sick family member or to cope with a death in the family. Br. App. A-1-A-3; *see* NEV. REV. STAT. 284.345(1) (authorizing Nevada's director of personnel to adopt regulations governing use of leave, with and without pay, by state employees). State employees could take paid leave *in excess* of five days "where an employee's attendance is required to provide, participate in or arrange for intensive care and/or treatment or receive extensive training in the proper utilization of equipment, techniques and supplies essential for continuous maintenance of good health." Br. App. A-2.

Since this time, the amount of paid family-care leave awarded to state employees has only increased. In 1984, the entitlement to paid family-care leave doubled from five to ten days. Br. App. B-2-B-3. In 2000, the entitlement was increased to 120 hours, but the 120-hour limitation does not apply if the employee's leave is authorized under the FMLA. Br. App. B-4.

Beyond this standard unpaid and paid leave, Nevada has, since 1989, allowed state employees to request special "catastrophic leave" after an employee exhausts his or her accrued sick and annual leave. Act of June 15, 1989, ch. 334, §§ 2-4, 1989 Nev. Stat. 693. Under this program, state employees may donate their accrued sick leave to a specific employee with unusual needs or to a general catastrophic leave fund administered by each state department. NEV. REV. STAT. 284.362(1). An employee can use catastrophic leave to aid a member of "the employee's immediate family" who has "a serious illness" or has been in an "accident which is life threatening or which will require a lengthy convalescence." NEV. REV. STAT. 284.362(1)(a)(2). This provision, moreover, defines "family" more broadly than the FMLA. Br. App. B-5-B-6.

Finally, Nevada has authorized state employees to enforce these statutory leave benefits through civil actions in state court. Specifically, under Nevada Revised Statutes 41.031(1), Nevada has waived its immunity to suits of this kind. *But see* NEV. REV. STAT. 41.031(3) (preserving Nevada's Eleventh Amendment immunity in federal court).

C. History Of The Family Medical Leave Act.

Long after Nevada implemented its comprehensive family-care leave policy, Congress initiated debate on a national leave program. *See* H.R. REP. 103-8 at 18. In April 1985, Representative Patricia Schroeder introduced

the first national leave bill, H.R. 2020 or the Parental and Disability Leave Act of 1985, in the House of Representatives. H.R. REP. 103-8 at 18. Under this bill, employers were required to provide eighteen weeks of unpaid leave over a twenty-four month period for the birth, adoption, or serious illness of a child. H.R. 2020, 98th Cong. § 103(a) (1985).

After the House failed to take action on H.R. 2020, Representative Clay sponsored a similar bill the following year. This bill, H.R. 4300, had the same leave provisions as H.R. 2020 but applied only to employers with five or more employees. H.R. 4300, 99th Cong. §§ 102(3), 103(a) (1986). Around the same time, Senator Christopher Dodd introduced a similar bill in the Senate, S. 2278. S. 2278, 99th Cong. §§ 103, 104 (1985). The 99th Congress adjourned, however, before final action was taken on either S. 2278 or H.R. 4300. H.R. REP. 103-8 at 19.

In 1987, Representative Clay and Senator Dodd introduced national leave legislation for a third time. H.R. 925, 100th Cong. (1987) (Family and Medical Leave Act); S. 249, 100th Cong. (1987) (Parental and Temporary Medical Leave Act). These bills were the first to include a provision for family-care leave. *See* H.R. 925 § 103(a)(1)(C); S. 249 § 103. Like their predecessors, however, these bills were not passed by Congress.

Representative Clay and Senator Dodd introduced the fourth national leave bills, H.R. 770 and S. 345, in 1989. S. 345, which applied to employers with twenty or more employees, required employers to provide ten weeks of family-care leave and thirteen weeks of personal medical leave. S. 345, 101st Cong. §§ 102(4), 103(a)(1), 104(a)(1) (1989). H.R. 770, in contrast, required ten weeks of family-care leave and fifteen weeks of personal medical leave, and it applied to employers with fifty or more employees for

three years after the legislation's enactment, and to employers with thirty-five or more employees thereafter. H.R. 770, 101st Cong. §§ 101(5), 103(a), 104(a) (1989). H.R. 770 was subsequently amended to provide twelve weeks of leave in all circumstances, *see* H. Amdt. 442, 101st Cong. (1990) (Gordon Amendment), and as amended, was adopted by both Houses of Congress. The bill was vetoed, however, by President George H.W. Bush. H.R. REP. 103-8 at 19-20.

In 1991, the Family and Medical Leave Act of 1991 was introduced as H.R. 2 and S. 5. H.R. 2, 102d Cong. (1991); S. 5, 102d Cong. (1991) H.R. REP. 103-8 at 20. Both bills were identical to the 1989 legislation vetoed by President Bush. The 1991 legislation was also vetoed by President Bush. H.R. REP. 103-8 at 20.

In 1993, after years of debate and extensive negotiation, Congress again passed a national leave bill identical to the 1989 and 1991 legislation vetoed by President Bush. *See* Family And Medical Leave Act, H.R. 1, 103rd Cong. (1993). In the same year, this legislation was signed into law by President Clinton. That law, the FMLA, is at issue here.

By its terms, the FMLA grants public-sector[2] and private-sector employees the right to take twelve weeks of leave for

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[2] Nevada does not dispute that Congress intended the FMLA to apply to state governments. The FMLA expressly provides that the kind of employer required to comply with the Act includes "public agencies," as that term is defined in the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 2611(4)(A)(iii). The FLSA definition of public agencies includes state governments. 29 U.S.C. § 203(x). This Court ruled in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67-68 (2000), that a similar reference to state governments in another federal statute clearly expressed Congress's intent to include states within the legislation's scope.

the birth or adoption of a child, or to care for a family member's (or the employee's own) serious health condition. 29 U.S.C. § 2612(a)(1). Employees may take the leave intermittently, but employers may require employees to substitute accrued paid leave for FMLA leave. *Id.* § 2612(b), (d)(2). The FMLA also guarantees, in most cases, that an employee will retain his or her job and benefits during and after the leave period. *Id.* § 2614.

The FMLA contains specific enforcement provisions that authorize employees, whose rights under the Act have been violated, to file civil actions for money damages, liquidated damages, equitable relief, and attorneys' fees. *Id.* § 2617(a)(1)-(3). The Secretary of the United States Department of Labor may also file civil actions against employers for money damages or injunctive relief. *Id.* § 2617(b)(2)-(3), (d).

The purpose of the FMLA is clearly stated in 29 U.S.C. § 2601. In this section, Congress provides that the FMLA is a response to the changing demographics of the American workforce, a change that has seriously impacted family care. Congress observed that "the number of single-parent households and two parent households in which the single parent or both parents work is increasing significantly." *Id.* § 2601(a)(1). The "lack of employment policies to accommodate working parents," however, was forcing "individuals to choose between job security and parenting." *Id.* § 2601(a)(3).

In light of these new pressures on families, Congress enacted the FMLA to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b)(1). To that end, Congress required employers to grant "reasonable leave for medical reasons, for the birth or

adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." *Id.* § 2601(b)(2). The leave was intended not only to help employees but also "[to] accommodat[e] the legitimate interests of employers." *Id.* § 2601(b)(3). Finally, Congress required employers to grant FMLA benefits "on a gender-neutral basis" so that the FMLA would be "consistent with the Equal Protection Clause." *Id.* § 2601(b)(4).

Although Congress cited the Equal Protection Clause in support of its decision to create gender-neutral leave benefits, it did not invoke Section 5 of the Fourteenth Amendment as a basis for its authority to enact the FMLA. Nor did Congress mention in any finding that States were engaging in unconstitutional conduct.

The FMLA's legislative history confirms that Congress's goal in enacting a national leave policy was to begin to define a balance between family care and productivity by establishing a minimum labor standard.

Emphasizing that her leave bill was intended to address a family-care crisis, Representative Schroeder stated: "I think one of the problems we have had . . . in America is that we have viewed it as a male versus female problem and it is really a child's problem, the future's problem, the family's problem." *Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcomm. On Civil Service and the Subcomm. On Compensation and Employee Benefits*, 99th Cong. 33 (1986).

Echoing Representative Schroeder's view, Senator Dodd urged passage of a national leave policy because "we ought to at least help guarantee that parents who already have jobs do not lose them because they have to spend unpaid time at home upon the birth, adoption or serious illness of a child." *Parental and Medical Leave Act of 1987: Hearings on S.*

249 Before the Subcomm. On Children, Family, Drugs and Alcoholism, Part I, 100th Cong. 6-7 (1987) ("*Part I, 1987 Hearings*").

Like Representative Schroeder and Senator Dodd, the House and Senate Reports state that the FMLA's benefits were needed because employers had failed to respond to three demographic changes: (i) the dramatic increase in the female civilian labor force and the necessity that households have two wage earners; (ii) the "equally dramatic" increase in single-parent homes; and (iii) the aging of the American population. H.R. REP. 103-8 at 22-24; S. REP. 103-3 at 5-6. These demographic shifts both "intensified the tensions between work and family," H.R. REP. 103-8 at 21; S. REP. 103-3 at 4, and acted as a "substantial drag on national productivity." S. REP. 103-3 at 7. Because the FMLA responds to changes in the labor market, the House and Senate Reports refer to the Act as a minimum labor standard, similar to the minimum wage. H.R. REP. 103-8 at 21; S. REP. 103-3 at 4.

The testimony underlying these reports similarly identifies the need for balance between family care and economic productivity as the impetus for the FMLA. The Senate committee overseeing the FMLA held ten hearings between 1987 and 1993 to consider the FMLA and its predecessor acts. S. REP. 103-3 at 7. The House committee conducted similar hearings over the same period. H.R. REP. 103-8 at 18-21.

Most of this testimony concerned FMLA provisions that are not at issue here, such as maternity and paternity leave. With respect to family-care leave, the relevant leave provision, the Senate and House committees heard a wide array of testimony. Many men and women testified that they had compromised their job security by taking leave to care for an ill child or parent. H.R. REP. 103-8 at 25-26;

S. REP. 103-3 at 9-11. In the same vein, Dr. Robyn Stone of the National Center for Health Services Research and Health Care Technology Assessment, testified that eleven percent of individuals requiring leave to care for an ailing spouse or family member had to quit their jobs. *Id.* at 11. According to a survey for the American Association of Retired Persons, thirty-eight percent of working caregivers had to change from full-time to part-time employment, and twenty percent had their health benefits reduced. *Id.* In addition, pediatricians testified that a seriously ill child's recovery is greatly enhanced by parental care but that a parent's job security is important to ensure that a sick family member has uninterrupted insurance coverage. *Id.* at 10.

The United States Department of Justice ("DOJ") offered extensive testimony about federally-mandated leave. In 1987, then-Assistant Attorney General Stephen Markman testified on behalf of DOJ about the constitutionality of Congress's proposed nationally-mandated leave and concluded that such leave would likely violate the Tenth and Eleventh Amendments of the United States Constitution. *Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. On Children, Family, Drugs and Alcoholism, Part II*, 100th Cong. 508 (1987) ("*Part II, 1987 Hearings*"). Specifically, Assistant Attorney General Markman observed that the proposed leave legislation "purports to authorize actions for damages against state governments in federal court. In all likelihood, such damage actions would be prohibited by the Eleventh Amendment." Br. App. C-13 (written testimony of Assistant Attorney General Markman). The full text of Assistant Attorney General's prepared testimony is set forth in the appendix to this Brief. *See* Br. App. C.

Consistent with its 1987 position, DOJ currently refuses to defend the FMLA's personal leave provision, 29 U.S.C.

§ 2612(a)(1)(D), as a valid abrogation of sovereign immunity. Lodging by United States, filed May 20, 2002 (Letters from Solicitor General Theodore B. Olson to the House and Senate).

D. History Of The Case.

This case concerns the leave request of a former Nevada public employee, William Hibbs ("Hibbs"). Hibbs began working for the Nevada Department of Human Resources on February 6, 1995. R. Doc. 8, D. Nev., Nev.'s Summ. J. Mot. at 2-4. In October 1996, Hibbs made his first request for leave under § 2612(a)(1)(C) of the FMLA to care for his ailing wife. *Id.* In April and May 1997, Hibbs again requested FMLA leave, as his wife recovered from an accident and neck surgery. *Id.* Hibbs was subsequently authorized to take twelve weeks of § 2612(a)(1)(C) leave intermittently between May 1, 1997, and December 31, 1997, but was required to substitute appropriate types of paid leave (*i.e.*, annual, sick, and catastrophic paid leave) for unpaid FMLA leave. Pet. App. 2a; R. Doc. 8, D. Nev., Nev.'s Summ. J. Mot. at 3-4; *see also* 29 U.S.C. § 2612(d)(2) (allowing employers to require substitution of paid leave). Between June and September 1997, Hibbs requested nearly 560 hours of catastrophic leave. Pet. App. 2a. In all, during 1997, Hibbs received twelve weeks of § 2612(a)(1)(C) leave and over 500 hours of paid leave through Nevada's personal and family-care leave programs. R. Doc. 8, D. Nev., Nev.'s Summ. J. Mot. at Exhibit N; *see* NEV. REV. STAT. 284.362; NEV. ADMIN. CODE § 284.558.

As a result of his numerous leave requests, Hibbs failed to appear for work for nearly half the year and at no time after August 5, 1997. Pet. App. 2a. By October 1, 1997, Hibbs had exhausted his twelve weeks of § 2612(a)(1)(C) leave and all the paid leave available through his sick, annual, and catastrophic leave accounts. R. Doc. 8, D. Nev.,

Nev.'s Summ. J. Mot. at 5. Nonetheless, Hibbs failed to return to work. Pet. App. 3a. Eventually, Nevada informed Hibbs that if he did not return he would be subject to disciplinary action. *Id.* Hibbs continued to miss work and was terminated after a disciplinary hearing. *Id.*

On April 20, 1998, Hibbs filed this action against Nevada in the United States District Court for the District of Nevada. J.A. 6. He sought money damages, injunctive relief, declaratory relief, and attorneys' fees, asserting both state and federal claims. J.A. 12-18. With respect to the federal claims, Hibbs alleged that the State had violated both the FMLA by failing to properly account for his leave time and the Due Process Clause of the United States Constitution by failing to conduct a proper pre-termination hearing. J.A. 12-14. The state law claims were based on asserted violations of state personnel statutes, the Due Process Clause of the Nevada Constitution and other state law causes of action. Pet. App. 3a; J.A. 14-16. Hibbs did not allege that Nevada discriminated against him based on his gender when considering his leave requests.

On June 4, 1999, the district court granted summary judgment in favor of Nevada primarily on the ground that the Eleventh Amendment barred Hibbs' FMLA claim. Pet. App. 59a-60a. In relevant part, the court reasoned that the FMLA is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment (and thus does not validly abrogate sovereign immunity) because the Act establishes an economic benefit instead of a remedy to discrimination. *Id.* at 54a-55a.

Hibbs timely appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, and the United States intervened to defend the constitutionality of § 2612(a)(1)(C). Pet. App. 4a. The Ninth Circuit reversed the district court's dismissal of Hibbs' FMLA

claims on the ground that § 2612(a)(1)(C) is a valid exercise of Congress's Section 5 power. Pet. App. 6a.

At the outset of its opinion, the Ninth Circuit stated that this Court's decisions in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), "offer[ed] limited guidance" because those cases "depended heavily upon the fact that age and disability classifications are not subject to heightened scrutiny under the Equal Protection Clause." Pet. App. 11a. The circuit court also distinguished the decisions of seven other federal circuit courts, all of which had held that the FMLA does not validly abrogate sovereign immunity.[3] *Id.* at 5a.

The Ninth Circuit next outlined three independent rationales for its decision. *First*, the Ninth Circuit held that the FMLA is presumptively constitutional. *Id.* at 17a-19a. The court reasoned that the Act was designed to remedy gender discrimination. Because state-sponsored gender discrimination is presumptively unconstitutional, "Section 5 legislation that is intended to remedy or prevent gender discrimination is *presumptively constitutional*. That is, the burden is on the challenger of the legislation to prove that [s]tates have *not* engaged in a pattern of unconstitutional conduct." *Id.* at 18a (emphasis added). *Second*, the Ninth Circuit held that the FMLA's (and the predecessor acts') legislative history contained sufficient evidence of gender discrimination to justify Congress's exercise of Section 5

[3] *See Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001); *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Garrett v. Univ. of Ala. Bd. of Tr.*, 193 F.3d 1214 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

power. *Id.* at 20a-22a. *Third*, the court held that Congress properly sought to remedy the effect of historical state conduct that perpetuated the stereotype that women are family caregivers. Pet. App. 23a-36a. Considering this historical evidence, the Ninth Circuit concluded that the FMLA is an "appropriately limited scheme designed to undo the impact of that history of state-supported and mandated sex discrimination as it continues to affect private and public employment." Pet. App. 23a.

SUMMARY OF ARGUMENT

I. The FMLA's text and history fail to indicate that § 2612(a)(1)(C) is an exercise of Congress's authority under Section 5 of the Fourteenth Amendment. There is no express reference to Section 5 in the Act itself, and the FMLA's legislative history fails to demonstrate that Congress intended to exercise its remedial authority. The circumstances surrounding the FMLA's enactment, moreover, indicate that the Act is an exercise of Congress's power under the Commerce Clause. Section 2612(a)(1)(C) creates a minimum labor standard that was meant to aid workers, not to remedy perceived discrimination. In this way, § 2612(a)(1)(C) is markedly differently from the other federal statutes this Court has previously reviewed. Here, the intent of Congress to exercise its Fourteenth Amendment power cannot be inferred, *Pennhurst State Hosp. v. Halderman*, 451 U.S. 1, 16 (1980), and no "legislative purpose or factual predicate" for such intent can be discerned from the FMLA's history. *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983). Because remedying discrimination was not the actual purpose of § 2612(a)(1)(C), any *post hoc* rationalization of the law as remedial must be rejected. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982). § 2612(a)(1)(C).

II. Even if § 2612(a)(1)(C) were intended to remedy past discrimination, the section would not be valid Section 5 legislation because it is not congruent and proportional to any alleged unconstitutional conduct. Section 2612(a)(1)(C) is not anti-discrimination legislation. It does not ban discrimination in the granting of leave or prohibit non-gender-neutral leave policies. Instead, § 2612(a)(1)(C) requires States to provide an extra-constitutional benefit of twelve weeks of family-care leave.

A. As a threshold matter, States may, consistent with the Constitution, deny or require a benefit so long as their benefits policies have a rational basis and are not intentionally discriminatory. *Danridge v. Williams*, 397 U.S. 471, 485 (1970); *Washington v. Davis*, 426 U.S. 229, 242 (1976). Accordingly, Congress may prohibit only a narrow range of state conduct pertaining to the administration of benefits.

B. Congress's exercise of Section 5 authority is congruent to unconstitutional conduct only if it responds to a pattern or practice of state discrimination. *Garrett*, 531 U.S. at 368. When Congress enacted the FMLA, it did not refer to any pattern or practice in the administration of state leave benefits that was unconstitutional. To the contrary, the legislative history demonstrates that Congress looked to the States for guidance. Congress recognized the States' innovative family-care leave policies and relied on the States' experience with those policies to conclude that the FMLA would not be costly or cause discrimination. Accordingly, "Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Kimel*, 528 U.S. at 91; *see Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. at 627, 644 (1999) (referring to primary point of legislative history).

C. The substantive benefit established in § 2612(a)(1)(C) is not proportionate to any alleged unconstitutional state conduct. It applies to all fifty States even though numerous States have a long history of providing gender-neutral family-care leave. In addition, the statute has no termination provision. In this way, § 2612(a)(1)(C) is distinguishable from the Voting Rights Act the Court upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Finally, the twelve-week leave period established in § 2612(a)(1)(C) is disproportionate to any unconstitutional denial of family-care leave. The twelve-week period is based on child development needs, not family needs or discrimination. Because § 2612(a)(1)(C) amounts to a substantive change of the Fourteenth Amendment's guarantees, it cannot be construed as valid Section 5 legislation or result in the abrogation of Eleventh Amendment immunity.

III. The Ninth Circuit's contrary analysis is incorrect. First, the Ninth Circuit wrongly presumed that § 2612(a)(1)(C) remedies gender discrimination and erroneously required Nevada to prove that it had *not* engaged in unconstitutional conduct. In adopting this presumption, the Ninth Circuit misread the FMLA and this Court's Section 5 jurisprudence. Second, the Ninth Circuit cobbled together and misinterpreted snippets of evidence about leave benefits in the FMLA's legislative history and, as a result, wrongly concluded that the history demonstrates a pattern of state discrimination. Finally, the Ninth Circuit erred by relying on archaic state laws to conclude that § 2612(a)(1)(C) is an appropriate remedy to past state discrimination.

ARGUMENT

Nevada does not contest the FMLA's importance as social policy or Congress's power to authorize suits against

private employers for violating § 2612(a)(1)(C). No one disputes that States have immunity from lawsuits by private citizens for money damages. *See* U.S. CONST. amend. XI; *Alden v. Maine*, 527 U.S. 706, 727 (1999). For over a century, moreover, this Court has held that Congress may not abrogate a State's immunity from private damages suits through the exercise of its Article I power. *Hans v. Louisiana*, 134 U.S. 1, 16 (1890); *Seminole Tribe*, 517 U.S. at 72-73. The narrow issue here is simply whether § 2612(a)(1)(C) is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment that abrogates the States' immunity. It is not.

Like the legal question presented, the effect of holding § 2612(a)(1)(C) unconstitutional would be limited. To be sure, such a holding would preserve the States' sovereign powers, protect their fisc, and thus have tremendous importance to the States. *See* THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton). But the holding would not eliminate all remedies against States for violating state and federal leave provisions. If, for example, state officers were to violate the Equal Protection Clause by granting leave in an intentionally discriminatory manner, state employees could commence actions for money damages under 42 U.S.C. § 1983. Prospective relief against state officers may also be available under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). In addition, States would not be immune from claims filed by the Federal Government in federal court. *See* 29 U.S.C. § 2617(b)(2); *Employees of the Dep't of Pub. Health & Welfare v. Missouri Pub. Health Dep't*, 411 U.S. 279, 286 (1973). Finally, States like Nevada, which have waived their immunity from suit in state court, may be sued in state court if they violate state leave laws.

I. SECTION 2612(a)(1)(C) IS NOT AN EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

When determining whether a statute is a valid exercise of Congress's power under the Fourteenth Amendment, this Court examines, as a threshold matter, whether Congress intended to enforce the Amendment's guarantees. *Pennhurst*, 451 U.S. at 16 ("The case for inferring [Congress's] intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States. . . ."); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-23 (1934) (States retain immunity except where surrendered in the Constitutional Convention.). This inquiry follows from the Court's recognition that legislation should not be characterized as an exercise of Section 5 power unless the actual purpose of the law is to remedy past discrimination. Otherwise, parties to litigation could offer *post hoc* rationalizations of a law that are unrelated to congressional intent simply to further their damage claims. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982).

Any attempt to characterize § 2612(a)(1)(C) as Section 5 legislation is a *post hoc* rationalization of the provision that is unsupported by the FMLA's text or history. The FMLA's text fails to mention Section 5 of the Fourteenth Amendment, and nowhere indicates that § 2612(a)(1)(C) was intended to address unconstitutional gender discrimination. The FMLA's history is likewise silent on this point. In all the thousands of pages of congressional reports, hearing transcripts and floor debate about leave, Congress never suggested that § 2612(a)(1)(C) was intended to address unconstitutional state discrimination.

The fairest reading of the FMLA's text and history is that Congress was exercising its power under the Commerce Clause to create a minimum labor standard, similar to the minimum wage, when it enacted § 2612(a)(1)(C). No doubt, the provision was intended as a workplace regulation. Its express purpose is to "balance the *demands of the workplace* with the needs of families, to *promote the stability and economic security* of families, and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b)(1) (emphasis added); Pet. App. 62a.

The FMLA's history confirms that this was Congress's intent. For example, in 1987, Senator Christopher Dodd stated that national leave was necessary because "[w]e must no longer force parents to choose between caring for a new or sick child and their jobs." *Part I, 1987 Hearings*, *supra*, at 277. He hoped the Act would "promote the economic security of families by providing for job protected leave for parents." *Part II, 1987 Hearings*, *supra*, at 459.

In addition, the Senate Report summarized the impetus for the FMLA as follows:

> With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill. When there is no one to provide such care, individuals can be permanently scarred as basic needs go unfulfilled. Families unable to perform their essential function are seriously undermined and weakened. Finally, when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults.

S. REP. 103-3 at 7; *see also* H.R. REP. 103-8 at 24 (stating same). The House and Senate Reports further indicate that

the FMLA is "based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment." H.R. REP. 103-8 at 21-22; S. REP. 103-3 at 4. In the "tradition of labor standards" the Act purported to address "significant new developments in today's workplace." S. REP. 103-3 at 5.

Contrary to its position in the Ninth Circuit and before this Court, DOJ represented to Congress that the goal of federally-mandated leave was simply "to enable employees to attend to family needs and at the same time continue with their jobs and careers." Br. App. C-2. Indeed, DOJ, like Nevada and the State *amici* here, characterized such leave as a standard employment "benefit like health insurance, pension plans, or paid vacation" that was best created through "[c]ollective bargaining agreements" instead of national legislation. *Id.*

Beyond characterizing federally-required leave as a labor standard, DOJ testified that federal leave legislation would be an exercise of Congress's "Commerce Clause . . . not [S]ection 5" power. *Id.* C-13 n.4. For this reason, DOJ concluded that the FMLA's authorization of private actions for damages against States "[i]n all likelihood . . . would be prohibited by the Eleventh Amendment." *Id.* C-13.

The reality that Congress was not legislating under Section 5 when it enacted § 2612(a)(1)(C) is clear not only from the FMLA's text and history but also from the circumstances surrounding its enactment. Since the first leave bill was introduced in 1985, Congress's primary concern has been to strike a balance between the benefits and costs of leave. H.R. REP. 103-8 at 29; S. REP. 103-3 at 12. Presumably to strike the proper balance (and secure the votes to pass the Act), the terms of the numerous leave

bills introduced in the House and Senate were varied. They required different amounts of leave, different types of leave—providing initially for child-care leave and only later for family-care leave—and applied to employers of varying sizes. *See supra* pp. 7-9. This wrangling over terms and costs is the hallmark of social-policy legislation, not anti-discrimination legislation. Congress ultimately determined the appropriate length and type of leave based on evidence of family needs and employer costs, not discrimination. *Parental Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. On Labor Management Relations and the Subcomm. On Labor Standards*, 100th Cong. 206-207 (1987) (Representative Schroeder explaining the twelve-week time period in the Act is based on pediatric needs).

In addition, when the FMLA was enacted, Congress had *already* remedied leave-based gender discrimination generally through Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of gender, and through the Pregnancy Disability Act of 1978, which prohibits employers from discriminating on the basis of pregnancy and requires employers to grant pregnancy leave in the same manner that disability leave is granted. *Newport News v. EEOC*, 462 U.S. 669, 684 (1983); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976). Most States, moreover, had already adopted gender-neutral family-care leave policies. *See supra* pp. 4-5; Br. for *Amici* States 5-14.

Congress viewed the FMLA as addressing social concerns that are not necessarily gender specific. Numerous *men* testified that they had suffered due to inadequate family-care leave and stressed the need to remedy *family* pressures, not pressures on women. *See supra* pp. 10-14. Because Congress was equally concerned with the leave demands of men *and* women, § 2612(a)(1)(C) cannot be

understood as legislation remedying a bias with respect to women.

Finally, Congress was chiefly concerned with leave policies in the private sector. As a cursory review of the legislative history demonstrates, the vast majority of testimony before Congress concerned the inadequacies of private-employer leave policies. To achieve its goal of creating a nationwide labor standard, moreover, Congress needed only to apply the standard to private employers. Because the Eleventh Amendment does not prohibit Congress from enacting legislation directed at private parties, Congress's failure to detail gender discrimination in the granting of leave is understandable: it did not need to identify discrimination to justify the Act's application to private parties. *United States v. Morrison*, 529 U.S. 598, 626-27 (2000).

Congress's failure to rely on, indeed mention, its Fourteenth Amendment power distinguishes this case from the Court's earlier Section 5 cases. *See Pennhurst*, 451 U.S. at 16 (observing that Congress's intent to remedy discrimination was clearly shown in the statutes at issue in *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

For instance, in *City of Boerne*, the Court reviewed the Religious Freedom Restoration Act, an act that contained an express provision that it was intended to protect religious freedom from substantially burdensome laws. *City of Boerne*, 521 U.S. at 515 (citing to 42 U.S.C. § 2000bb(b)). In *Florida Prepaid*, the Court considered the Patent Remedy Act, which Congress "justified as an acceptable method of enforcing the provisions of the Fourteenth Amendment." *Florida Prepaid*, 527 U.S. at 637 (citing to a Senate report

on the Patent Remedy Act). Moreover, in *Kimel*, Congress's intent to address discrimination was clear from the title of the Age Discrimination in Employment Act, the Act under review. *Kimel*, 528 U.S. at 66 (referring to 29 U.S.C. § 623(a)(1), which prohibits age discrimination). In *Morrison*, Congress's intent to address discrimination against women through the Violence Against Women Act was obvious from the Act's history. *Morrison*, 529 U.S. at 605-07 (describing the provision of the Act that heightens the punishment for gender-based crimes). Finally, in *Garrett*, the Court recognized that Congress intended to exercise its Section 5 power when it enacted the Americans with Disabilities Act because the Act expressly prohibited employers from "discriminating against a qualified individual with a disability because of the disability." *Garrett*, 531 U.S. at 360-61 (citing to 42 U.S.C. § 12112(a)).

Where, as here, Congress fails to identify Section 5 of the Fourteenth Amendment as the basis for legislation in the statute's text or legislative history and does not directly prohibit discrimination, the Court has refused to "quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst*, 451 U.S. at 16; *see EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983) (Court should be able to "discern some legislative purpose or factual predicate that supports the exercise of [Fourteenth Amendment] power," even if Congress does not need to use magic words to invoke that power). In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), for example, the Court, in an opinion authored by Justice O'Connor, rejected the argument that the "actual purpose" of a law was to remedy past discrimination absent evidence that Congress intended to exercise its Section 5 power. *Id.* at 730; *see also Florida Prepaid*, 527 U.S. at 642 (similarly noting legislative record

"provides little support for the proposition" Congress was actually seeking to remedy a Fourteenth Amendment violation).

Because Congress meant only to exercise its Commerce Clause powers when it adopted § 2612(a)(1)(C), the provision cannot now be rationalized as Section 5 legislation to circumvent the Eleventh Amendment. *Mississippi Univ. for Women*, 458 U.S. at 730; *Seminole Tribe*, 517 U.S. at 72-73.

II. SECTION 2612(a)(1)(C) IS NOT APPROPRIATE SECTION 5 LEGISLATION.

A. Scope Of The Right Protected By The FMLA.

Even if § 2612(a)(1)(C) were an exercise of Congress's Section 5 power, the provision would still be inappropriate remedial legislation (and thus would fail to validly abrogate the States' immunity) because it is not a congruent and proportional response to any alleged unconstitutional conduct. Section 5 of the Fourteenth Amendment empowers Congress to prohibit state conduct that violates the Equal Protection Clause. It also, in some instances, empowers Congress to prohibit a "somewhat broader swath of conduct" than is forbidden by the Constitution in order to remedy an unconstitutional practice. *Kimel*, 528 U.S. at 81; *see Garrett*, 531 U.S. at 365; *Fla. Prepaid*, 527 U.S. at 638. When Congress exercises this latter, broader authority, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

No one contends that § 2612(a)(1)(C) simply prohibits unconstitutional conduct. It does not ban discrimination in the granting of leave or prohibit non-gender-neutral leave policies. Section 2612(a)(1)(C) requires States to provide the substantive benefit of twelve weeks of family-care

leave. The question here is thus whether the FMLA's extra-constitutional benefit is a congruent and proportional remedy to some asserted unconstitutional practice.

To determine whether legislation is an appropriate exercise of Congress's power under Section 5, this Court begins by "identify[ing] with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 366; *see College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672-73 (1999). If the right at issue is narrow, Congress's authority to remedy violations of the right is correspondingly narrow. *Kimel*, 528 U.S. at 86 (judging proportionality against backdrop of how Constitution protects a particular right); *see South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (observing that Congress has wide latitude to adopt anti-discrimination policies in voting context because Constitution strictly prohibits such discrimination).

In *Garrett*, for example, this Court identified the constitutional right at issue in the Americans with Disabilities Act as the right of the disabled to be free from unconstitutional state discrimination. *Garrett*, 531 U.S. at 366. Similarly, in *Kimel*, the Court concluded that Congress was acting to prohibit unconstitutional discrimination against the elderly when it enacted the Age Discrimination in Employment Act. *See Kimel*, 528 U.S. at 82-86. The Court observed that the States could permissibly classify individuals based on their disability or age so long as the classification was reasonably related to a legitimate state interest. Thus, the range of unconstitutional conduct that Congress could "remedy" under Section 5 was fairly narrow. *See id.*; *Garrett*, 531 U.S. at 367-68.

Here, the range of conduct that Congress may prohibit is similarly narrow. A State may constitutionally provide or deny any benefit unless the State's benefits policy lacks a

rational basis or is intentionally discriminatory. "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Danridge v. Williams*, 397 U.S. 471, 485 (1970). "So long as its judgments are rational, and not invidious, the legislature's efforts . . . are not subject to a constitutional straitjacket." *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). The basic principle governing a challenge to a state benefits policy is that the state legislature's discretion will not be disturbed by the courts "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Mathews v. de Castro*, 429 U.S. 181, 185 (1976) (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

Applying these principles, this Court has upheld statutes withholding benefits under a social welfare program because "the Due Process Clause can be thought to interpose a bar *only* if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (emphasis added). Statutes granting new benefits have been similarly upheld because "only where there is manifest and unreasonable discrimination in fixing the benefits . . . can the legislative determination be said to contravene the [E]qual [P]rotection [C]lause." *Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 3 of Sevier County*, 266 U.S. 379, 386-87 (1924).

Even if a State fails to provide a benefit and the denial disproportionately burdens one gender, the benefits policy is constitutional so long as it is not motivated by some discriminatory purpose. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) (even if a neutral law has a disproportionately adverse affect on a racial minority, it is unconstitutional only if that impact can be traced to a discriminatory purpose). That is, to be unconstitutional the

State's decision to withhold a benefit must be "shaped" by a "gender-based discriminatory purpose." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 276 (1979). "[P]urposeful discrimination is the condition that offends the Constitution." *Id.* at 274 (citations omitted).

Accordingly, there are very few instances in which a State's decision to deny a leave benefit altogether would be unconstitutional. Only if the State's denial has no rational basis or is shaped by a particular discriminatory animus would the State act unconstitutionally.

B. Congress Failed To Identify Any History Or Pattern Of Unconstitutional Discrimination In The States' Administration Of Leave.

Assuming § 2612(a)(1)(C) were intended to remedy some unconstitutional administration of family-care leave, the provision would be an appropriate remedy only if the States had engaged in a *pattern* or *practice* of this unconstitutional conduct. *Garrett*, 531 U.S. at 370. "Just as § 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress's § 5 authority is appropriately exercised only in response to state transgressions." *Id.* at 368 (emphasis added) (citations omitted); *Fla. Prepaid*, 527 U.S. at 640 ("It is this conduct then—unremedied patent infringement by the States—that must give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act."); *Katzenbach*, 383 U.S. at 308 ("The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."). "It is a most serious charge to say a State has engaged in a pattern and practice designed to deny its citizens the equal protection of the laws." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). The respect due to States and the structural limits on Congress's Section 5 power thus require actual

evidence of a pattern of unconstitutional state discrimination before Congress may validly abrogate sovereign immunity.

The legislative history of the FMLA is devoid of any evidence of unconstitutional state conduct in the granting of leave, let alone "a pattern of irrational state discrimination" or purposeful discrimination sufficient to support an exercise of Section 5 power. *Garrett*, 531 U.S. at 368; *see Fla. Prepaid*, 527 U.S. at 645. The Senate and House Reports mention no state misconduct. The FMLA's history is indeed so lacking in this regard that seven separate circuit courts have held the FMLA unconstitutional. *See supra* note 3. The only reference to the Fourteenth Amendment in the entire Act, moreover, is in a provision explaining Congress's decision to extend leave benefits to both men and women. 29 U.S.C. § 2601(b)(4).

Congress's failure to even mention unconstitutional state conduct, itself, is sufficient to demonstrate that § 2612(a)(1)(C) is not a valid Section 5 remedy. Where, as here, Congress is supposed to be enacting anti-discrimination legislation, one would expect "some mention" of unconstitutional state behavior. *Garrett*, 531 U.S. at 371.

The mention of unconstitutional conduct, indeed, should be significant. As the Court's decisions in *Garrett*, *Kimel*, and *Florida Prepaid* demonstrate, a disjointed or insignificant mention of general discrimination is insufficient to support Congress's exercise of Section 5 authority. *See Garrett*, 531 U.S. at 369-70 (holding the Americans with Disabilities Act was not appropriate Section 5 legislation even though the Act contained congressional finding regarding disability discrimination in society); *Kimel*, 528 U.S. at 90 (acknowledging Congress found widespread age discrimination present in the private sector); *Florida Prepaid*, 527 U.S. at 640-41 (holding that

pattern of unconstitutional state takings could not be inferred from only "two examples of patent infringement suits" against States).

Far from documenting a pattern of unconstitutional conduct, the FMLA's history demonstrates that Congress looked to the States for guidance. Congress was fully aware that States had adopted innovative family-care leave policies. Both the House and Senate Reports acknowledge that thirty States, the District of Columbia, and Puerto Rico had adopted some form of family-care leave in the years preceding the FMLA's enactment. H.R. REP. 103-8 at 32-33; S. REP. 103-3 at 20-21. Congress was told by Gerald McEntee, International President of the American Federation of State, County and Municipal Employees, that the National Conference of State Legislators endorsed family-care leave. *Part I, 1987 Hearings*, *supra*, at 384.

In a hearing before the Labor-Management Relations Subcommittee, Congresswoman Roukema observed that "[t]here can be no question but that this is an issue which has picked up tremendous momentum in the States." *The Family and Medical Leave Act of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor-Management Relations*, 102d Cong. 4 (1991). In an earlier hearing on similar legislation, the Congresswoman stated that leave concerns "could be handled by the [S]tates, and indeed it is moving ahead rapidly in State legislatures." *Parental Leave Hearing on H.R. 925 Before the Committee on Small Business*, 100th Cong. 22 (1987). The former Governor of the State of New Jersey, Thomas Kean, testified that, "the States, as they have in so many areas, have been in the laboratories in the sense they've forged a path" with leave policy. *Hearing on H.R.2*, *supra*, at 40. *See Part I, 1987 Hearings*, *supra*, at 469-70 (Lieutenant Governor Richard Licht of Rhode Island stating that, as Justice Brandeis

foretold, States have acted as a series of family-care leave laboratories from which the federal government can learn).

Most telling, DOJ opposed the FMLA because it believed the States were enacting adequate family-care leave laws. In his testimony before a Senate subcommittee, then-Assistant Attorney General Markman observed that States were well ahead of the Federal Government in implementing leave:

> Already this year, more than half of the States have seen the introduction of parental leave proposals in their legislatures. Indeed, six of them have approved specific measures this year on the subject, while an additional 11 States already have in place similar enactments. In other words, more than one-third of the States already have in place some form of parental leave policy.

Part II, 1987 Hearings, *supra*, at 508 (statement of Stephen J. Markman, Assistant Attorney General, U.S. Department of Justice). In the Assistant Attorney General's opinion, state legislatures are better at creating leave policies because States "serve as laboratories of public policy experimentation [,and] [s]uch experimentation ultimately is likely to result in superior and in some instances naturally uniform policies." Br. App. C-10.

Congress relied on the States' experiences to determine whether a national leave policy would be cost effective. Legislators who had introduced state family-care leave laws in Wisconsin and South Carolina testified at hearings, and Senator Dodd questioned the Massachusetts Governor's advisor on women's issues about the State's experience with FMLA-like leave. *See Part II, 1987 Hearings*, *supra*, at 180, 361. Relying on testimony from Ellen Galinsky of the Families and Work Institute regarding family-care leave policies in Minnesota, Oregon, Rhode Island, and

Wisconsin, Congress concluded that such policies are cost effective. S. REP. 103-3 at 14-17; H.R. REP. 103-8 at 30.

Congress also relied on the States to conclude that a national leave policy would not *cause* gender discrimination. Senator Dodd lauded state leave plans as being non-discriminatory. He challenged arguments that the FMLA would lead to discrimination by citing the experiences of California, Colorado, and Montana, where female unemployment had decreased since the enactment of state-mandated leave policies. *See Part II, 1987 Hearings*, *supra*, at 194-95. When DOJ took the position the FMLA would lead to discrimination, Senator Dodd disagreed, citing the experiences of Massachusetts, Washington, and Connecticut. *Id.* at 533-34.

Congress, indeed, *complimented* the States' innovative approaches to family-care leave. It acknowledged in the legislative history not only that States had innovated in the field of employee leave but also that many States had implemented more generous leave policies than the FMLA. H.R. REP. 103-8 at 50; S. REP. 103-3 at 38. The FMLA expressly recognized the existence of more generous state leave policies by stating that nothing in the Act "shall be construed to supercede any provision of any State or local law that provides greater family or medical leave rights . . . ." 29 U.S.C. § 2651(b). To accommodate state innovation in the future, the FMLA further provides that it shall not "be construed to discourage employers from adopting or retaining leave policies more generous" than those in the Act. 29 U.S.C. § 2653.

Beyond the FMLA's legislative history, the States' actual practice demonstrates that state leave policies have not administered benefits in a discriminatory fashion. As the State *amici* powerfully demonstrate, many States have enacted gender-neutral leave policies since 1945. Br. for

Amici States 5-14; *see supra* pp. 4-5. Numerous States, including Nevada, provide not only unpaid leave but also paid catastrophic leave and paid sick leave to employees with sick family members. *See supra* pp. 4-8; Br. for *Amici* States 5-14. Finally, although paternity and maternity leave policies are not at issue here, since at least 1973, Nevada has provided that "pregnancy shall not jeopardize an employee's job or seniority." Br. App. A-4.

In sum, the FMLA's legislative history and the actual history of state leave policies demonstrate that Congress was not remedying a pattern of unconstitutional discrimination when it enacted § 2612(a)(1)(C). The reality is that States are, and have long been, the innovative force behind progressive and constitutional leave policies, not an obstacle to their development. Accordingly, "Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Kimel*, 528 U.S. at 91; *see Fla. Prepaid*, 527 U.S. at 644 (referring to primary point of legislative history).

C. Section 2612(a)(1)(C) Independently Fails The Proportionality Requirement Of Section 5.

Even if the Court were to find some evidence suggesting that States had, in the past, irrationally failed to provide leave or denied leave because of some discriminatory animus, § 2612(a)(1)(C) would still be unconstitutional because it is a disproportionate remedy to such conduct. The section requires States to provide twelve weeks of family-care leave without pay regardless of any particular State's historical or current conduct.

The inappropriateness of this sweeping remedy is apparent when § 2612(a)(1)(C) is compared to the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Garrett*, 531 U.S. at 373 (comparing ADA to

Voting Rights Act); *City of Boerne*, 521 U.S. at 530, 532-33 (comparing the Religious Freedom and Restoration Act to Voting Rights Act). In *Katzenbach*, the Court upheld the Voting Rights Act as appropriate remedial legislation partly because the Act was tailored to specific unconstitutional policies. *Katzenbach*, 383 U.S. at 330-32, 337.

In designing the Voting Rights Act as a remedy to racial discrimination in voting, Congress studied the instances of discrimination and determined that previous anti-discrimination legislation had failed. In addition, it found that unconstitutional conduct was most prevalent in areas that used literacy tests and had a low number of registered voters relative to the national average. *Id.* at 330-32. Congress developed a formula under which the Voting Rights Act restrictions would apply only in locations where indicia of discrimination, such as literacy tests and low voter registration, were present. *Id.*; *City of Boerne*, 521 U.S. at 533 (presence of literacy tests reflects history of discrimination). As the Court observed in *Katzenbach*, this formula guaranteed that the Voting Rights Act's most sweeping provisions would apply only to locations that had the greatest likelihood of a prevalent practice of racial discrimination. *Katzenbach*, 383 U.S. at 330-32. Similarly, in *City of Rome*, the Court allowed remedial measures that precluded literacy tests only in areas with a history of intentional discrimination. *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *City of Boerne*, 521 U.S. at 533.

Congress also created a termination procedure whereby the Voting Rights Act's restrictions could be lifted if a State complied with the Act. *Katzenbach*, 383 U.S. at 331-33. The termination period ensured that only States that had a continuing practice of discrimination would remain under the Act's strict requirements year after year.

When Congress enacted the FMLA, however, it did not conclude that earlier attempts to remedy discrimination had failed, and it did not identify a pattern of purposeful discrimination. Section 2612(a)(1)(C) is, nonetheless, *broader* than the Voting Rights Act. Most notably, § 2612(a)(1)(C) applies to all fifty States, even though some, like Nevada, have been granting its employees gender-neutral family-care leave for over fifty years. *Morrison*, 529 U.S. at 626-27 (discrimination against victims of gender-motivated crimes in some States did not justify assumption that discrimination occurred nationally). The disproportionate nature of this response is surprising given that Congress never found gender discrimination in the granting of leave to be a problem of national import, either in the private or public sectors.

In addition, unlike the Voting Rights Act, § 2612(a)(1)(C) does not include a termination provision but applies in perpetuity. The absence of a sunset provision leads to the absurd result that States, like Nevada, that provide FMLA-type family-care leave as a matter of state law are treated as if they purposefully engage in a pattern of unconstitutional conduct or irrationally deny leave. *See* NEV. REV. STAT. 284.360(5), Br. App. B-5-B-6. The Act's indiscriminate scope confirms that Congress made no attempt to confine § 2612(a)(1)(C) to a specific remedial purpose. *Kimel*, 528 U.S. at 91; *Fla. Prepaid*, 527 U.S. at 647; *City of Boerne*, 521 U.S. at 532.

The specific entitlement to twelve weeks of leave is similarly disproportionate to any unconstitutional denial of family-care leave. While Congress is not limited under Section 5 to *prohibiting* violations of the Fourteenth Amendment, it cannot *create* new entitlements under this provision. *See Kimel*, 528 U.S. at 81 (observing that Congress can only "prohibi[t] a somewhat broader swath of conduct . . . [than] that which is not itself forbidden by the

Amendment's text") Granting Congress this authority would indeed be a novel interpretation of Section 5.

The particular substantive benefit at issue here is completely unrelated to any Fourteenth Amendment guarantee. The twelve-week family-care leave period is based on the development needs of young children. Congress apparently believed that, after three months, infants can be more easily separated from their parents. S. REP. 103-3 at 9. This leave period is not related to family care or, more importantly, to unconstitutional discrimination.

The substantive benefit provided by § 2612(a)(1)(C) is, indeed, so disproportionate to any alleged unconstitutional conduct that it can be understood only "as a substantive change in constitutional protections." *City of Boerne*, 521 U.S. at 532; *see Kimel*, 528 U.S. at 88-89 (Age Discrimination in Employment Act should not substantively redefine State's legal obligations). Although the States may, consistent with the Constitution, deny *all* leave, Congress has mandated that States provide twelve weeks of family-care leave to their employees absent any evidence that the employees' constitutional rights have been violated as a result of state leave policies. While Congress has the right to decide that requiring family-care leave is good social policy, it may not authorize the recovery of money damages from States for denying family-care leave without substantially rewriting the Fourteenth Amendment's guarantee. *Garrett*, 531 U.S. at 374.

III. THE NINTH CIRCUIT'S CONTRARY ANALYSIS IS WRONG.

Despite Congress's failure to identify any basis for characterizing § 2612(a)(1)(C) as Section 5 legislation, the Ninth Circuit held the provision validly abrogates sovereign

immunity. The court reasoned, first, that § 2612(a)(1)(C) is presumptively constitutional because Congress intended the provision to address gender discrimination. Nevada, moreover, had failed in the court's view to prove that it did *not* discriminate in the administration of family-care leave. Second, the Ninth Circuit held that the legislative history of the FMLA contained sufficient evidence of unconstitutional gender discrimination. Finally, the court reasoned that § 2612(a)(1)(C) is an appropriate remedy to historical state discrimination. All three rationales are erroneous.

A. The Ninth Circuit Erred By Requiring Nevada To Disprove The Existence Of Discrimination.

1. The Ninth Circuit Wrongly Held That § 2612(a)(1)(C) Is A Remedy To Gender Discrimination.

The Ninth Circuit concluded that § 2612(a)(1)(C) remedies gender discrimination based on a provision in the FMLA's "Findings and purposes" section. This provision reads:

> It is the purpose of this Act—to accomplish the purposes described in paragraphs (1) and (2) [balancing the demands of workplace and family and entitling employees to take reasonable leave] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis.

29 U.S.C. § 2601(b)(4). Far from suggesting that Congress was exercising its Section 5 power, this provision indicates that the FMLA's benefits are gender-neutral

because gender-specific benefits would have offended the Equal Protection Clause.

The Ninth Circuit avoided the clear meaning of this provision by conveniently omitting the majority of its text. Specifically, the Court characterized this provision as stating that "It is the purpose of this Act—. . . (4) to[,] . . . consistent with Equal Protection Clause of the Fourteen Amendment, minimize[ ] the potential for employment discrimination." Pet. App. 34a. By rewriting this provision, the Ninth Circuit made it seem that the FMLA's purpose is to minimize discrimination consistent with Equal Protection Clause when its real purpose is to accomplish certain other goals in a manner consistent with that Clause.

That Congress intended to explain its own conduct, rather than state conduct, is supported by the House and Senate Reports. They clearly state that Congress included a reference to the Equal Protection Clause in the FMLA to protect the Act *itself* from constitutional attack.

> The FMLA addresses the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition.
>
> A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. S. 5, by addressing the needs of all workers, avoids such a risk.
>
> Thus S. 5 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment.

S. REP. 103-3 at 16; *See also* H.R. REP. 103-8 at 29 (same).

The Ninth Circuit's reliance on § 2601(a)(5) is equally misplaced. *See* Pet. App. 12a-13a. This section provides that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5). The Ninth Circuit presumed that this phenomenon had been caused by state conduct. Nothing in that finding, and nothing in the congressional record, however, indicates that Congress believed the phenomenon was the result of unconstitutional discrimination, particularly by States. It simply observed a social reality without attributing blame.

For the same reason, the Ninth Circuit erred in adopting the United States' argument that gender discrimination can be extrapolated from the fact that women are regarded as having "the primary responsibility for family caregiving." Pet. App. 13a. Again, nothing in the legislative history of the FMLA supports the conclusion that Congress equated this responsibility with discrimination. Similarly, nothing in the legislative history, or history generally, suggests that women have tended to assume the role of family caregiver because of unconstitutional gender discrimination by States in the granting of family-care leave.

2. The Ninth Circuit Misread This Court's Equal Protection Jurisprudence.

After concluding that Congress intended § 2612(a)(1)(C) to remedy gender discrimination, the Ninth Circuit held that the provision was entitled to a presumption of constitutionality, and required Nevada to prove that it had *not* engaged in any unconstitutional conduct when granting family-care leave. Pet. App. 13a-15a.

The Ninth Circuit's decision to shift the burden of proof to Nevada was based on its reading of this Court's gender

discrimination cases. *Id.* 13a-14a. Under this precedent, "the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an exceedingly persuasive justification for the challenged classification." *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981). Interpreting this precedent, the Ninth Circuit held that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, [S]ection 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional." Pet. App. 18a.

To be sure, if this Court were reviewing a state law that "expressly discriminates on the basis of sex," *Kirchberg*, 450 U.S. at 461, it would require the State to prove that the discriminatory provision is substantially related to an important governmental objective. But the Court is not reviewing *state* law. It is reviewing *Congress's* exercise of power. When Congress intends to exercise its Section 5 power, moreover, this Court's precedents indicate that *Congress*, not the *States*, must demonstrate that the exercise is necessary to remedy a pattern or practice of unconstitutional conduct. This is true even if Congress is purporting to remedy discrimination against a suspect class.

In *Katzenbach*, for example, the Court observed that Congress's Fifteenth Amendment power, like its Fourteenth Amendment power, "is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." 383 U.S. at 326. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). Applying this test, the Court identified the exact constitutional prohibition that Congress intended to correct and considered whether the Act remedied that

discrimination. *Katzenbach*, 383 U.S. at 308-10, 328. Even though the act under review combated discrimination subject to strict scrutiny—racial discrimination in voting—the Court never mentioned, or applied, any shifting burden.

Similarly, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court upheld the validity of Section 5 legislation that protected minority voting rights. The Court stressed that Congress had identified ample evidence of discrimination by the States. The congressional record, moreover, indicated that Congress had intended to "eliminat[e] . . . an invidious discrimination." *Id.* at 654-56. Again, although Congress was enforcing voting rights, a fundamental right strictly protected by the Constitution, the Court never relieved the Federal Government of its burden to identify some "invidious discrimination," *id.* at 654, before abrogating the States' sovereign immunity.

In *Oregon v. Mitchell*, the Court upheld a federal ban on literacy tests and similar requirements for voter registration. 400 U.S. 112 (1970) (overruled by the 26th Amendment to the Constitution establishing the right to vote at age 18). Here, too, the Court examined whether Congress had a basis for the exercise of its Section 5 power. The Court did so, moreover, even though Congress was legislating in an area subject to heightened scrutiny.

Finally, in *Morrison* and *City of Boerne*, the Court considered federal statutes that purported to remedy state discrimination subject to heightened scrutiny, specifically gender discrimination and freedom of expression, respectively. *Morrison*, 529 U.S. 598 (gender discrimination); *City of Boerne*, 521 U.S. 507 (freedom of expression). In both cases, the Court looked to Congress, not the States, to identify and substantiate its reasons for abrogating the Eleventh Amendment immunity. This

precedent demonstrates that the Ninth Circuit's analytical approach is inconsistent with Section 5 jurisprudence.

The same precedent demonstrates that the Ninth Circuit's burden shifting would undermine the limits on Congress's Section 5 power. Courts would not be able to determine whether remedial legislation is proportional and congruent unless Congress were required to identify some backdrop of unconstitutional state conduct. In addition, if Congress could simply mention discrimination against a protected class and invoke its enforcement power, the Eleventh Amendment immunity would pose no limit on Congress whatsoever. Including the magic words "gender" and "Equal Protection Clause" in the "purposes" section of legislation would be enough to subject States to suit unless they could establish a negative fact: that they have never engaged in unconstitutional conduct. Given the difficulties inherent in proving a negative, States would frequently be subject to broad remedial legislation absent any indication that they have acted unconstitutionally. This would conflict with the system of dual sovereignty established by the Constitution and reduce the States from sovereigns to ordinary defendants, without immunity, in civil litigation.

Finally, burden shifting fundamentally alters the Fourteenth Amendment's guarantees. In the particular context of leave, this Court has recognized that States can deny benefits to specific classes of individuals without violating the constitution so long as the classification has a rational basis. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143-44 (1977). In *Satty*, for example, the Court upheld the constitutionality of a policy that excluded pregnancy as a basis for sick leave. The Court stated that where a leave plan is a facially neutral plan and its only fault is underinclusiveness, the burden is on the plaintiff to show that the plan discriminates. *Id.* at 144.

Similarly, in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court held that States could constitutionally deny pregnant women the benefit of disability insurance so long as the exclusion has a rational basis. In *General Electric v. Gilbert*, 429 U.S. 125 (1976), *superseded by statute*, 42 U.S.C. § 2000e, the Court affirmed that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 136.

Under the Ninth Circuit's rationale, however, States may no longer create merely rational benefits classifications. They must prove that any classification lacks a discriminatory motive. *See Garrett*, 531 U.S. at 372 (ADA would have changed where constitution places burden); *Kimel*, 528 U.S. at 88 (ADEA would have redefined the States' constitutional obligations); *City of Boerne*, 521 U.S. at 534 (RFRA would have made substantive alteration to Constitution). This would clearly redefine the parameters of the Fourteenth Amendment. *See Garrett*, 531 U.S. at 374; *City of Boerne*, 521 U.S. at 529.

B. The Ninth Circuit Erroneously Concluded That The FMLA's Legislative History Establishes A Pattern Of Unconstitutional State Conduct.

In the alternative, the Ninth Circuit held, contrary to seven other circuits, *see supra* note 3, that the FMLA's legislative history contains sufficient evidence of a pattern of unconstitutional state conduct in the granting of leave. Specifically, the Ninth Circuit cited two pieces of evidence to conclude that States have unconstitutional family leave policies: (i) private sector data indicating that private employers appear to have maternity leave policies but not paternity leave policies; and (ii) the testimony of one witness that public and private sector paternity and maternity policies differ little. Pet. App. 20a. Although the

Court acknowledged that these two pieces of evidence did not, alone, document a widespread pattern of state discrimination, the Ninth Circuit held that, when combined, the evidence was circumstantial proof of state discrimination in family leave policies. *Id.*

The Ninth Circuit's analysis is fundamentally flawed. First, the Ninth Circuit's conclusion that private-sector leave policies are similar to state leave policies is wrong as a matter of fact. State leave is different and far more generous than private leave. As the Bureau of Labor Statistics has indicated, "unpaid maternity leave was more prevalent in State and local governments, where 59 [percent] of employees were offered this benefit. Thirty-seven percent of employees in medium private establishments were offered this benefit." UNITED STATES DEP'T OF LABOR, EMPLOYEE BENEFITS SURVEY BULL. NO. 2444, EMPLOYEE BENEFITS OF STATE AND LOCAL GOVERNMENTS (1992).

Unlike the Bureau of Labor Statistics study, the private sector data on which the Ninth Circuit relied, specifically the Yale Bush study, is irrelevant to the issues here. The latter study says nothing about state leave policies (indeed was unrelated to state policies), does not mention discrimination by States, and was not relied upon by Congress to demonstrate unconstitutional conduct. *See Garrett*, 531 U.S. at 371 (accounts of disability discrimination not part of study to determine presence state discrimination); *Kimel*, 528 U.S. at 90 (discounting reliance on study of age discrimination because it did not indicate States had engaged in discrimination). The study concerned infant care generally and concluded that a lack of adequate infant care is a national problem. H.R. REP. 103-8 at 27; S. REP. 103-3 at 9.

The Ninth Circuit also erred in presuming that some alleged state discrimination in the granting of paternity leave translates into discrimination in granting family-care leave. Pet. App. 21a. There is no evidence in the FMLA's legislative history indicating that these two types of leave overlap. In the absence of such evidence, the Ninth Circuit's presumption of state discrimination is untenable. *See Garrett*, 531 U.S. at 375 (Kennedy, J., concurring).

In any event, the scant evidence cobbled together by the Ninth Circuit falls well short of the evidence of unconstitutional conduct in *Garrett*, *Kimel* and *Florida Prepaid*, and even that history was insufficient to establish a pattern of state discrimination. *See Garrett*, 531 U.S. at 371-72; *Kimel*, 528 U.S. at 89; *Fla. Prepaid*, 527 U.S. at 647.

C. The Ninth Circuit Wrongly Justified § 2612(a)(1)(C) As A Response To Archaic State Laws.

Finally, the Ninth Circuit upheld § 2612(a)(1)(C) based on archaic state laws and judicial decisions. The Ninth Circuit's reliance on these laws, not the substantial, modern effort by States to correct gender discrimination, is inappropriate. Similarly, the Ninth Circuit erred by supplying a rationale for § 2612(a)(1)(C) that is absent from the FMLA's history.

This Court has clearly recognized that out-of-date laws and archaic practices cannot justify current remedial legislation. In *Garrett*, for example, the Court held that, although old state laws relating to the treatment of the disabled would be objectionable today, those archaic laws could not support an exercise of Section 5 power unless a "State had persisted in" those historic practices. *Garrett*, 531 U.S. at 356 n.6. Similarly, in *City of Boerne*, the Court

refused to uphold Congress's exercise of Section 5 power to remedy religious persecution because there had been "no episodes [of persecution] occurring in the last 40 years." *City of Boerne*, 521 U.S. at 530.

Like *Garrett* and *City of Boerne*, this case does not concern *current* unconstitutional conduct. At best, the state laws and judicial decisions that concerned the Ninth Circuit were repealed or overruled at least four decades ago. Forty years ago, however, even *federal* statutes and *federal* courts discriminated on the basis of gender. *See* Pet. App. 29a n.25. Since then both state governments and the Federal Government have enacted laws that prohibit private and public discrimination based on gender. Where gender discrimination exists, States seek to correct it.

The Ninth Circuit's conclusion that § 2612(a)(1)(C) is a response to outdated state laws suffers from a more fundamental flaw. Namely, the holding is inconsistent with congressional intent. The touchstone of all Section 5 analysis is congressional intent. The FMLA's history contains *no* indication, however, that Congress was concerned about archaic state practices when it created family-care leave. Such practices are not even mentioned. By attributing to Congress a concern it did not have, the Ninth Circuit wrongly substituted its view of the FMLA for Congress's intent. Pet. App. 28a-38a.

Finally, even if archaic laws contribute to gender discrimination and societal stereotypes, and misperceptions about gender roles persist, the States have taken such significant steps to undermine these prejudices that § 2612(a)(1)(C) will have little, if any, impact on them.

CONCLUSION

For the reasons stated above, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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APPENDIX A

Excerpts from Nevada Rules of State Personnel Administration

Effective July 1973

Rule VII

* * *

Sections A through C Omitted

* * *

D. Sick Leave

* * *

Sections 1 through 5 Omitted

* * *

6. An employee is entitled to use sick leave only when incapacitated to perform the duties of his position due to sickness or injury, when quarantined, or when receiving required medical or dental service or examination, or illness or death in his immediate family. (Also refer to Rule VIII, A, g).

a. In the event a serious illness in an employee's immediate family requires his attendance, he may use sick leave not to exceed five (5) days in any one calendar year. For this purpose, immediate family is defined as the employee's parents, spouse, children (natural, adopted or foster), brothers, sisters, grandparents, great grandparents, uncles, aunts, nephews, grandchildren, nieces, great grandchildren, step-parents, and, if living in the employee's household, shall include father-in-law, mother-in-law, son-in-law or daughter-in-law, grandfather-in-law or grandmother-in-law, great

grandfather-in-law or great grandmother-in-law, uncle-in-law or aunt-in-law, brother-in-law or sister-in-law, grandson-in-law or granddaughter-in-law, nephew-in-law or niece-in-law, great grandson-in-law or great granddaughter-in-law, and step-children. With the approval of the appointing authority and concurrence of the Personnel Division an employee may be granted additional family sick leave.

The State Personnel Division may approve an exception to this limitation where an employee's attendance is required to provide, participate in or arrange for intensive care and/or treatment or receive extensive training in the proper utilization of equipment, techniques and supplies essential for continued maintenance of good health. In this case, the employee submits his request (Form NPD-21) for an exception of the limitation to his appointing authority. The request must be accompanied by an individual certification from a physician or other suitably qualified person as to the actual need for the employee's participation. The certificate of need must identify the immediate family member's illness and contain an explanation as to:

1. Relative seriousness of the illness and a projection of the probable length of time the employee's attendance will be required; and

2. The exact role of the employee while in attendance.

   The appointing authority or State Personnel Division may request the submittal of supplemental information.

b. In the event of a death in the employee's immediate family, he may use sick leave not to exceed five (5) working days for each death. For this purpose, immediate family is defined as the employee's parents, spouse, children, brothers, sisters, grandparents, great grandparents, uncles, aunts, nephews, grandchildren, nieces, great grandchildren, father-in-law or mother-in-law, son-in-law, daughter-in-law, grandfather-in-law or grandmother-in-law, great grandfather-in-law or great grandmother-in-law, uncle-in-law or aunt-in-law, brother-in-law or sister-in-law, grandson-in-law or granddaughter-in-law, nephew-in-law or niece-in-law, great grandson-in-law or great granddaughter-in-law, and step-parents or step-children.

• • •

Sections 7 through 9 Omitted

• • •

10. An employee is entitled to use accumulated sick leave for adoption purposes or as maternity leave regardless of the type of delivery or results of pregnancy, if the provisions below are fully complied with.

a. A maternity leave may be taken prior to the expected birthdate of the child.

b. If, after exhausting her accumulated sick leave, an employee needs additional time off from work, annual leave shall be granted. If additional time is required, leave without pay may be granted by the appointing authority if he considers it justifiable and for the good of the public service.

c. Pregnancy shall not jeopardize an employee's job or seniority, except for leave without pay limitations. The employee shall be responsible for reporting the pregnancy as soon as it is an established fact so that steps may be taken to protect the employee's health or modify her working conditions and in order that any necessary staffing adjustments may be planned.

E. Leaves of Absence

1. A leave of absence without pay may be granted only to an employee who desires to return therefrom to the State service.

2. Leaves of absence without pay for 30 working days or less in any calendar year may be approved by the appointing authority.

3. Upon request of the appointing authority and approval of the State Personnel Division, leaves of absence without pay for more than 30 working days and up to one year may be granted to an employee for any satisfactory reason. (Also refer to Rule VIII, A, g).

4. The Commission, upon the recommendation of the State Personnel Division may grant leaves of absence without pay in excess of one year for purposes deemed beneficial to the public service.

5. A leave of absence with pay shall be granted to any State employee who serves on a jury or as a witness for the federal government, the State of Nevada, or a political subdivision thereof. The employee shall be paid his regular salary while on court leave and retain any witness or jury duty fees, when summoned for jury duty or serving as a witness in any case. When an employee, serving

in his official capacity as a State employee and as part of his required duties.

APPENDIX B

Excerpts from the Nevada Administrative Code

1982 Nevada Administrative Code:

§ 284.554 Sick leave: Authorized use.

An employee is entitled to use sick leave only when:

1. He is unable to perform the duties of his position because of sickness or injury;

2. He is quarantined;

3. He is receiving required medical or dental service or examination; or

4. There is an illness or death in his immediate family.

[Personnel Div., Rule VII § D part subsec. 6, eff. 8-11-73; A 2-5-82]

§ 284.558 Sick leave: Illness in employee's immediate family.

1. If a serious illness in an employee's immediate family requires his attendance, he may use sick leave not to exceed 5 days in any 1 calendar year. For this purpose, "immediate family" means the employee's parents, spouse, natural, adopted or foster children, brothers, sisters, grandparents, great-grandparents, uncles, aunts, nephews, grandchildren, nieces, great-grandchildren and step-parents. If they are living in the employee's household, the term also includes the employee's father-in-law, mother-in-law, son-in-law, daughter-in-law, grandfather-in-law, grandmother-in-law, great-grandfather-in-law, great-grandmother-in-law, uncle-in-law, aunt-in-law, brother-in-law, sister-in-law, grandson-in-law, granddaughter-in-law, nephew-in-law, niece-in-law, great-grandson-in-law, great-granddaughter-inlaw, and step-children. With the approval of the appointing authority and

concurrence of the personnel division, an employee may be granted additional sick leave for this purpose.

2. The personnel division may approve an exception to this limitation where an employee's attendance is required to provide, participate in or arrange for intensive care or treatment or receive extensive training in the proper utilization of equipment, techniques and supplies essential for the continued maintenance of good health.

3. To obtain an exception, the employee must submit his request on a form provided by the division. The request must be accompanied by an individual certification from a physician or other qualified person as to the actual need for the employee's participation. The certificate of need must identify the family member's illness and contain:

(a) An explanation of the relative seriousness of the illness;

(b) A projection of the probable length of time the employee's attendance will be required; and

(c) An explanation of the exact role of the employee while in attendance.

4. The appointing authority or personnel division may request the employee to submit supplemental information.

[Personnel Div., Rule VII § D part subsec. 6, eff. 8-11-73; A and renumbered as subsec. 7, 2-5-82]

1984 Nevada Administrative Code:

§ 284.558 Sick leave: Illness in employee's immediate family.

1. If an illness or a medical, optometric or dental service or examination in an employee's immediate family requires his attendance, he may use his accumulated sick leave not to exceed 10 days in any 1 calendar year. For this purpose,

"immediate family" means the employee's parents, spouse, natural, adopted or foster children, brothers, sisters, grandparents, great-grandparents, uncles, aunts, nephews, grandchildren, nieces, great-grandchildren and step-parents. If they are living in the employee's household, the term also includes the employee's father-in-law, mother-in-law, son-in-law, daughter-in-law, grandfather-in-law, grandmother-in-law, great-grandfather-in-law, great-grandmother-in-law, uncle-in-law, aunt-in-law, brother-in-law, sister-in-law, grandson-in-law, granddaughter-in-law, nephew-in-law, niece-in-law, great-grandson-in-law, great-grandaughter-inlaw and step-children.

* * *

[Sections 2 and 3 Omitted]

* * *

[Personnel Div., Rule VII § D part subsec. 6, eff. 8-11-73; A and renumbered as subsec. 7, 2-5-82]--(NAC A by Dep't of Personnel, 10-26-84)

§ 284.578 Leave of absence without pay. (NEV. REV. STAT. 284.345)

1. Except as otherwise provided in NRS 284.360, a leave of absence without pay may be granted to an employee for not more than 1 year by the appointing authority for any satisfactory reason.

2. The commission, upon the recommendation of the appointing authority, may grant leaves of absence without pay in excess of 1 year for purposes deemed beneficial to the public service.

3. An appointing authority may require an employee on leave of absence without pay to submit every 2 weeks a statement of his intent to return to work.

4. Except as otherwise provided in NRS 281.390, if the reason for granting the leave no longer exists, or for another bona fide reason, the appointing authority may revoke the leave after notifying the employee in writing and allowing a reasonable time for the employee to return to work.

5. An employee shall request leave without pay at least 30 days in advance of when the need for the leave is foreseeable, if practicable.

[Personnel Div., Rule VII § E subsecs. 1-4, eff. 8-11-73]—(NAC A by Dep't of Personnel, 10-26-84; 3-23-94; 10-27-97)

2000 Nevada Administrative Code:

§ 284.558 Sick leave: Illness in employee's immediate family. (NEV. REV. STAT. 284.345)

1. Except as otherwise provided in this section, if an employee is needed to provide care for a member of his immediate family with an illness or other authorized medical need, the employee may use his accumulated sick leave, not to exceed 120 hours in any 1 calendar year. An employee is not subject to this 120-hour limitation if the leave is approved under the Family and Medical Leave Act.

* * *

[Sections 2 and 3 Omitted]

* * *

[Personnel Div., Rule VII § D part subsec. 6, eff. 8-11-73; A and renumbered as subsec. 7, 2-5-82]—(NAC A by Dep't of Personnel, 10-26-84; 3-23-94; 11-16-95; R082-00, 8-2-2000)

2002 Nevada Administrative Code:

§ 284.5234 "Family and medical leave" defined.

"Family and medical leave" means any paid leave or leave of absence without pay which is granted to an eligible employee:

1. For the birth of a child of the employee and the care of that child if the leave is taken during the 12 months immediately following the date of the birth of that child;

2. For the placement of a child through adoption or foster care with the employee if the leave is taken during the 12 months immediately following the date of placement of that child;

3. To care for his spouse, child or parent who has a serious health condition; or

4. Because of a serious health condition of the employee which makes him unable to perform one or more of the essential functions of his position.

(Added to NAC by Dep't of Personnel, eff. 3-23-94; A 11-16-95)

§ 284.5235 "Immediate family" defined. "Immediate family" means:

1. The employee's parents, spouse, children, regardless of age, brothers, sisters, grandparents, great-grandparents, uncles, aunts, nephews, grandchildren, nieces, great-grandchildren and stepparents; and

2. If they are living in the employee's household, the employee's father-in-law, mother-in-law, son-in-law, daughter-in-law, grandfather-in-law, grandmother-in-law, great-grandfather-in-law, great-grandmother-in-law, uncle-in-law, aunt-in-law, brother-in-law, sister-in-law, grandson-

in-law, granddaughter-in-law, nephew-in-law, niece-in-law, great-grandson-in-law, and great-granddaughter-in-law.

(Added to NAC by Dep't of Personnel, eff. 3-23-94)

§ 284.5811 Family and medical leave: Maximum amount in 12-month period. (NEV. REV. STAT. 284.345)

1. The entitlement for family and medical leave for an eligible employee is limited to a total of 12 weeks during a rolling 12-month period.

2. To calculate the hours of service needed for eligibility under the Family and Medical Leave Act, paid leave must be considered as time worked.

3. As used in this section, a "rolling 12-month period" means the 12-month period as measured backward from the date an employee uses any family and medical leave.

(Added to NAC by Dep't of Personnel, eff. 3-23-94; A 11-16-95; R082-00, 8-2-2000)

APPENDIX C

TESTIMONY

OF

STEPHEN J. MARKMAN
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
SUBCOMMITTEE ON CHILDREN, THE FAMILY, DRUGS & ALCOHOL

CONCERNING

THE PARENTAL AND MEDICAL LEAVE ACT OF 1987
S. 249

OCTOBER 29, 1987

Thank you, Mr. Chairman. I would like to thank the committee for inviting me to appear here today to offer the views of the Department of Justice on S. 249, the Parental and Medical Leave Act of 1987.

We understand the laudable goals of this bill—to enable employees to attend to family needs and at the same time continue with their jobs and careers—but we think that mandatory federal legislation is an inappropriate way to achieve them. Parental and medical leave is an employee benefit like health insurance, pension plans, or paid vacation. S. 249 directly contravenes our nation's consensus that fringe benefits should be the subject of voluntary negotiation between employers and employees. The voluntary approach maximizes the welfare of employees because it leaves them free to choose for themselves which benefits they most desire. Some employees may have a strong preference for the kinds of parental and medical leave provided for in S. 249. Others, however, may prefer different kinds of benefits. Employees should be permitted to act on their own preferences, rather than having the government choose for them.

Collective bargaining agreements frequently result in a package of benefits which best suit the needs of both the employer and employees. Parental and medical leave may be desirable for some employees, but others might prefer additional paid vacation or dental benefits. The effect of S. 249 would be to make parental and medical leave a mandatory option, almost certainly to the exclusion of some other option which the employees might prefer. In companies offering "cafeteria-style" plans, the diminution of choices would be even more apparent: employees would be required to accept parental and medical leave as one of their "choices," whether they want it or not. We believe this bill would have a detrimental effect on collective bargaining

because it would restrict the choices available to the unions, the employees, and the employers by making this particular benefit mandatory.

Let me take as an example the case of a comparatively small business with a fixed amount of money to spend on traditional employee benefits. If the workforce in this business consists primarily of older workers, those workers would likely prefer that the money be spent on enhanced pension benefits since they can foresee a greater need for those benefits in the near future. If the workforce consists primarily of middle-aged employees who already have formed families, they might prefer increased medical and dental benefits. Even if the workforce consists of many people of child-bearing years, those people may prefer other sorts of benefits. For example, if they are engaged in a declining industry, they might prefer job retraining which in the long run increases their life-time earning capacity. The point of this illustration is that the people most directly affected by the benefit plan are in the best position to know their own financial interests. If the federal government forces a particular benefit on them, it deprives them of economic opportunities that in many cases they would value more highly.

S. 249 violates two of the Administration's most fundamental policies: generally relying on the market to fix the terms and conditions of private economic behavior and, whenever possible, relying on state, rather than federal, regulation of private sector activities. Furthermore, as drafted, the bill poses constitutional problems under the first, tenth and eleventh amendments of the Constitution. For these reasons, the Administration opposes enactment of S. 249.

The Department of Justice has particular legal and policy reasons for opposing this legislation, but other federal departments and agencies also are concerned about its potential effects. For example, the Department of Labor opposes the bill because they believe that imposing mandatory benefits that some employees might desire but others do not limits flexibility and actually would stifle a current, positive trend of employers accommodating the individual needs of their employees. I understand that the Department of Labor will be communicating separately with the subcommittee on this issue in the future.

I would also like to point out that the Government has an unusually liberal leave system. Moreover, the Office of Personnel Management (OPM) has urged federal agencies to show flexibility and accommodation in granting leave to both natural and adoptive parents, and has been conducting a congressionally-sponsored and experimental leave-sharing program which allows federal workers to help fellow employees who have serious medical or personal problems by contributing paid leave. The Administration is supporting an expansion of this demonstration program government-wide over a five year period. The ability to respond to the needs of employees with flexible and innovative solutions would be severely restricted by a national law that imposed a single standard on all employers.

Leaving aside these general policy concerns which have been expressed by various agencies and departments within the Administration, let me turn now to some specific legal and policy issues about which the Department of Justice is particularly concerned.

Minimizing Governmental Interference. This Administration firmly believes that, generally, the terms and

conditions of private employment should be decided in the private marketplace, without unnecessary interference by the federal government. The decision of whether to provide compensation in the form of disability and parental leave benefits is one properly left to the affected employees and employers, who can best gauge the benefits and corresponding costs of such compensation.

Ironically, this bill could hurt the very employees it is intended to help. In today's competitive environment, S. 249 would make younger women a potential liability because of the probability they will have children at some point in their lives. This, notwithstanding all manner of equal opportunity in employment legislation, may make young women the victims of subtle discrimination. Although the legislation would apply equally to men as well as women, the far greater likelihood that women would use the law means they would bear the costs.[1]

Even though the bill contains an exception for employers who employ fewer than fifteen employees, it would have a disproportionate impact on comparatively small businesses employing more than fifteen workers, which can be crippled by the loss of one or two key employees. This type of small business accounts for more than 50% of the 10 million jobs that have been created during the past four years alone. Requiring these businesses to provide these benefits will restrict their ability to employ more workers in the future. This problem may well be exacerbated if the Advisory

[1] *See* S. 249, § 103. With respect to parental leave, the bill does not distinguish between fathers and mothers. Either, or both, presumably would be entitled to take parental leave. However, experience suggests that new mothers are far more likely to take extended periods of leave than new fathers, who ordinarily return sooner to their jobs following the birth of a child.

Panel on Paid Parental & Medical Leave, provided for in S. 249, recommends legislation imposing "salary replacement" costs in whole or in part on employers.

Moreover, requiring this type of benefit necessarily limits the ability of employees to maximize their own compensation and requires those employees who have no use for disability or parental leave to subsidize those employees who have. In employment negotiations, employees may be forced to sacrifice wages or other benefits that they value more highly than the statutorily mandated "benefit" of parental and medical leave. Labor unions and employee organizations should have the maximum freedom to negotiate with employers, and S. 249 would circumscribe that freedom. Finally, to the extent they are able to do so, employers can be expected to pass the increased cost of these benefits on to consumers in the form of higher prices or reduced quality of the goods and services they produce.

Federalism. The Administration's strong commitment to the principles of federalism requires that the Department of Justice oppose federal government intervention in matters that traditionally have been the responsibility of the states, and in which there is no overriding need for national policy uniformity. The states are charged with protecting the health, safety, and welfare of their citizens. They uniquely possess the resources and competence to discern the conditions, needs and desires of their citizens on these issues, and the expertise to enact laws to address those concerns.

The attempt to federalize the law in this area has implications far beyond mandatory parental and medical leave; it is symptomatic of the persistent tendency of government officials in Washington—well meaning

officials—to act as if only we can fully understand and remedy the problems confronting 240 million Americans. It is this attitude that, in recent decades, has been responsible for the mushrooming growth of a national government that not only has undertaken unmanageable responsibilities, but also has usurped the decisionmaking authority of private citizens and of the levels of government closest to those citizens—the states and their localities.

This centralizing tendency is not difficult to understand. It is not surprising that public officials and other citizens, who believe that their public policy ideas are sound, want those ideas to be imposed uniformly upon the fifty states. It is not surprising that citizens who feel strongly about the merits of a public program want to bestow that program upon as many of their fellow-citizens as possible. And it is not surprising that a business or other private entity subject to some form of public regulation would prefer to abide by a single regulation promulgated by Washington than to have to abide by fifty separate regulations promulgated in Sacramento and Springfield and St. Paul. It is precisely because each of us can understand the impetus toward centralization of governmental authority that we have to be particularly careful to avoid falling victim to this tendency and, in the process, undermining the constitutional balances within our system of government.

As with many things elemental, there is a tendency sometimes to give the principles of federalism short shrift. I recognize that it is not always easy to identify a bright line between those responsibilities of government that ought to be carried out by the national government and those more appropriately addressed by the states. Even in this Administration, which is deeply committed to ensuring that each level of government operates in its appropriate sphere, we have sometimes had trouble drawing that line. It is

important, nevertheless, that those in the executive and legislative branches not lose sight of the inherent responsibility to confront this matter.

This responsibility is particularly acute given the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985). In that case, the Supreme Court held, with respect to federal regulation under the commerce clause, that Congress, not the federal courts, generally is the primary protector of state sovereign rights and responsibilities. As the Court observed,

> We continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the commerce clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action — the built-in restraints that our system provides through state participation in federal governmental action.

In other words, the principal burden of protecting the values of federalism in the commerce context lies with the Members of this body. As representatives, not only of the citizens of the states, but of the states themselves, it is the Congress that is principally vested with the responsibility to preserve the prerogatives of the states within the constitutional structure. Whatever the merits of the Court's decision in *Garcia*—and this Administration opposes its holding and has supported past legislative efforts to modify the Fair Labor Standards Act in response—its observations on the role of the Congress in upholding federalism can hardly be disputed.

Because of their importance to this Subcommittee's decision on whether to proceed with S. 249, I would like at

this time to briefly revisit the fundamental values of federalism. The healthy respect for the states envisioned by the Framers requires that the national government pay as much attention to *who* should be making decisions as to *what* decisions should be made and that, where appropriate, it defer to the states. It was the people of the states who created the national government by delegating to that government those limited and enumerated powers relating to matters beyond the competence of the individual states. All other sovereign powers, except for those expressly prohibited the states by the Constitution, are expressly reserved to the states or the people by the Tenth Amendment.

The Framers of the Constitution set up a structure that apportions power between the national and state governments. The values that underlie this structure of federalism are not anachronistic; they are not the result of an historic accident; they are no less relevant to the United States in 1987 than they were to our nation in 1789. In weighing whether a public function ought to be performed at the national or state level, we should consider the basic values that our federalist system seeks to ensure. Some of those principles include:

Dispersal of Power—By apportioning and compartmentalizing power among the national and 50 state governments, the power of government generally is dispersed and thereby limited.

Accountability—State governments, by being closer to the people, are better positioned as a general matter to act in a way that is responsive and accountable to the needs and desires of their citizens.

Participation—Because state governments are closer to the people, there is the potential for citizens to be more

directly involved in setting the direction of their affairs. This ability is likely to result in a stronger sense of community and civic virtue as the people themselves are more deeply involved in defining the role of their governments.

Diversity—Ours is a large and disparate nation; the citizens of different states may well have different needs and concerns. Federalism permits a variegated system of government most responsive to this diverse array of sentiment. It does not require that public policies conform merely to a low common denominator; rather, it allows for the development of policies that more precisely respond to the needs and desires of citizens within different geographical areas.

Competition—The states, by providing diverse responses to various issues which can be compared and contrasted, serve as laboratories of public policy experimentation. Such experimentation ultimately is likely to result in superior and in some instances naturally uniform policies, as states reassess their own and other states' experiences under particular regulatory approaches.

Containment—Experimenting with varying forms of regulation on a smaller, state scale rather than on a uniform, national scale confines the harmful effects of regulatory actions that prove more costly or detrimental than expected. Thus, while the successful exercises in state regulation are likely to be emulated by other states, the unsuccessful exercises can be avoided.

While these values of federalism may often militate in favor of state rather than national action, other factors—including a demonstrated need for national policy uniformity or for a monolithic system of enforcement—militate in favor of action by the national government and

must be balanced in this process. For example, the need for a uniform foreign policy on the part of the United States clearly justifies national rather than state action in this area. Similarly, in the interstate commerce area, the need for a uniform competition policy argues strongly for national antitrust law; and the need for efficient flow of interstate transportation argues for national rather than state regulation of airplane and rail safety. In other words, by federalism, we are not referring to the idea of "states' rights"; rather, we are referring to the idea expressed in the Constitution that certain governmental functions are more properly carried out at the level of the fifty states, while others are more properly carried out by the national government. Thus, it is critical that we not lose sight of the need to go through this analytic process.

When these factors are examined in the context of parental and medical leave benefits, the balance in the Administration's judgment is clearly struck in favor of state, not national, regulation. While some states may conclude that disability and parental leave requirements are, on balance, appropriate subjects for mandatory rules, others may not. Moreover, there is nothing magical about the 26 or 18 weeks specified in this bill. States that desire to impose leave requirements should be free to determine the amount of leave they believe is most appropriate.

We see no need for a uniform national rule on this subject. It is a matter best left to the private sector, to collective bargaining and to individual choice. But if it appears, in the judgment of state legislatures, that some regulation is desirable, the matter should be left to the states. Given the difficulty of divining the costs and benefits, and determining the appropriate levels of such leave policies, allowing the states to serve as laboratories and to experiment with a variety of approaches to the

perceived problems is preferable to imposing national regulation. At least seventeen states—including California[2], Tennessee, Louisiana, Oregon, Minnesota, Connecticut, and Rhode Island—already are experimenting with such laws, and their experience will be instructive to others.[3]

Tenth Amendment Problems. Regardless of the regulatory approach taken with respect to private sector employment matters, federalism principles clearly compel us to oppose federal government intervention in matters that traditionally have been the responsibility of the states where there is no evidence of an overriding need for national policy uniformity. Because state and local government employees would be covered by S. 249, the effect would be to increase state and local payroll costs and substantially reduce flexibility in state and local government personnel decisions. Whatever remains of judicially enforceable restraints on the reach of the commerce power into areas of state sovereignty after the Supreme Court's decision in *Garcia*, that opinion nonetheless recognized that the political process is the principal safeguard on state sovereignty in our constitutional system. In that spirit, the Department strongly urges that, as a policy matter, the federal government should seek to preserve for state and local governments the authority they need to manage their own affairs (*i.e.*, to provide needed services at a reasonable cost, and on terms that are mutually acceptable to voters and workers).

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[2] California's law recently was upheld by the Supreme Court in California Federal Savings & Loan v. Guerra, 107 S. Ct. 683 (January 13, 1987).

[3] *See* M. Brannigan, Laws on Parental-Leave Benefits Draw Opposition From Employers, Wall St. J., Oct. 12, 1987, p. 20.

Eleventh Amendment Problems. In addition, as presently drafted, section 109 of S. 249 purports to authorize actions for damages against state governments in federal court. In all likelihood, such damage actions would be prohibited by the Eleventh Amendment, which provides that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This language has been construed to bar suits against states, or state officials, by citizens of the same state who are seeking damages from the state treasury. *See Edelman v. Jordan*, 415 U.S. 651 (1974) (Eleventh Amendment bars suit for welfare payments wrongfully withheld).[4]

First Amendment Consideration. Unlike Title VII of the Civil Rights Act of 1964, 42 U..S.C. § 2000e-2(e), S. 249 provides no exemption for religious employers. Without such an exemption, the bill could, in some circumstances, potentially violate the Free Exercise Clause of the First Amendment.[5]

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[4] Because S. 249 would be enacted pursuant to the Commerce Clause (*see* section 101(4) of the bill), and not section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), is not applicable.

[5] *Cf. Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1986) (holding that the Free Exercise Clause of the First Amendment prohibited the state from enforcing sex discrimination laws against a religious school, because the refusal to renew a pregnant teacher's contract was based upon the school members' good faith religious belief that a mother of young children should be at home), *vacated on abstention grounds*, 106 S. Ct. 2718 (1986). S. 249's reinstatement requirement, coupled with its presumption of retaliation, could raise precisely the same issue. Other fact patterns might include a religious school's refusal to reinstate a teacher who had taken disability leave in connection with an abortion.

Separation of Powers Problems. In addition to our opposition to federal intervention in this area, the Department of Justice also opposes creation of the Advisory Panel on Paid Parental and Medical Leave, a hybrid commission designed to study means of "salary replacement" during periods of parental or temporary medical leave, and to recommend legislation on this subject to Congress. Under S. 249, the Advisory Panel would conduct a comprehensive study of methods to replace the salaries of workers on parental or temporary medical leave, and propose legislation to implement a system of salary replacement. Even though the members of the Advisory Panel need not be officers of the United States, both the Secretary of Health and Human Services and the Secretary of Labor are designated to serve. If the legislation is passed, these two cabinet officers will be placed in the unenviable, and perhaps unconstitutional, position of necessarily serving two masters. As Advisory Panel members, they would have the ability, and perhaps a duty, to recommend legislation to Congress without necessarily coordinating those policy recommendations with the President or other components of the executive branch. As members of the Cabinet, however, they are first and foremost responsible to the President. This type of conflict would be particularly acute in the case of the Secretary of Labor, who is invested with additional executive authority under Title I of the bill.

In closing, let me emphasize once again that it is not at all the *goals* of S. 249 to which we object. Like many in the Washington metropolitan area, I am a federal employee. I know that through years of sustained effort, federal

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While the question remains unsettled, the views expressed in the Sixth Circuit's opinion *Dayton Christian Schools* clearly implicate the constitutionality of these provisions of S. 249.

employees enjoy most of the benefits S. 249 would confer. For example, women in the federal workforce may use accrued paid annual and sick leave to take time off around the time of childbirth. They may extend their absence by taking leave without pay, and still retain the security of knowing they can come back to their former job. There is no fixed limit to the amount of leave: it is worked out on a case-by-case basis between the employee and her supervisor. Provision is made for new fathers to take time off as well. OPM has published guidelines urging agencies to adopt liberal leave policies in connection with adoption. Flexible leave without pay policies acceptable to both employees and supervisors allow individuals to take time from work to care for family members who are ill, or to deal with other family emergencies.

In the private sector, I know of businesses and even law firms which have substantially liberalized their leave policies beyond what would be mandated by S. 249. They have done this not because a federal law required them to do it, but because they know that such policies are an inducement to attract and keep valuable employees. In a similar vein, many employers, large and small, offer on-the-job day care facilities for infants and toddlers of their employees. Again, this is a voluntary response to the market, which these employers have undertaken in response to the demands of the workforce. We believe that voluntary programs such as these are vastly more beneficial to both employers and employees in the end, and are infinitely preferable to mandatory national legislation which, over time, would almost certainly become a ceiling, not a floor, on the level of benefits.

Thank you for giving the Department of Justice this opportunity to express our views on this bill. This

concludes my prepared statement. I would be happy to answer any questions from the Committee.

OCT 25 2002

No. 01-1368

In the Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL.,
PETITIONERS

v.

WILLIAM HIBBS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 29 U.S.C. 2612(a)(1)(C), the family-care provision of the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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In the Supreme Court of the United States

No. 01-1368

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL.,
PETITIONERS

v.

WILLIAM HIBBS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 273 F.3d 844. The ruling of the district court (Pet. App. 48a-60a) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 11, 2001. The petition for a writ of certiorari was filed on March 11, 2002, and granted on June 24, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, "to promote" the Equal Protection Clause's guarantee "of equal employment opportunity for women and men," 29 U.S.C. 2601(b)(5). After eight years of study, Congress found that, "due to the

nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. 2601(a)(5). Congress determined that, to counteract those sex roles and to diminish their impact on equal employment opportunities, employers must be required to provide family-care leave on a gender-neutral basis, because "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. 2601(a)(6).

In response to the effects of past gender discrimination and stereotyping in employment that it had found, Congress, in the FMLA, gave public and private employees the right, *inter alia*, "to take reasonable leave * * * for the care of a child, spouse, or parent who has a serious health condition" in "a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for * * * compelling family reasons, on a gender-neutral basis." 29 U.S.C. 2601(b)(2) and (4).

The FMLA's family-care provision entitles eligible employees to take up to twelve workweeks of unpaid leave annually to care for a parent, child, or spouse with a serious health condition. 29 U.S.C. 2612(a)(1)(C). The FMLA applies only to employees who have worked for the employer for at least one year and who provided 1250 hours of service within the last twelve months. 29 U.S.C. 2611(2)(A). Covered employers include state governments, 29 U.S.C. 2611(4)(A)(iii), 203(x), but the FMLA excludes from eligibility government employees who hold high-ranking or sensitive positions, 29 U.S.C. 2611(2)(B)(i) and (3), 203(e)(2)(C).[1] The FMLA requires employees to give advance notice of foreseeable leave, 29 U.S.C. 2612(e), and permits employers to require certification by a health care provider of the need for leave, 29 U.S.C. 2613.

The FMLA gives employees a private right of action "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," 29 U.S.C. 2617(a)(2), if they "interfere with, restrain or deny the exercise of" FMLA rights. 29 U.S.C. 2615(a)(1). The employee may obtain equitable relief, such as employment, reinstatement, or promotion, 29 U.S.C. 2617(a)(1)(B), and either lost pay and benefits, or actual monetary losses up to a sum equal to twelve weeks of wages, with interest. 29 U.S.C. 2617(a)(1)(A)(i) and (ii). If the employer fails to act in good faith, the employee may receive an equal amount as liquidated damages. 29 U.S.C. 2617(a)(1)(A)(iii). The accrual period for back pay is limited by the Act's two-year statute of limitations (which is extended to three years for willful violations). 29 U.S.C. 2617(c)(1) and (2). The Secretary of Labor may also conduct investigations and bring civil actions to enforce the FMLA. 29 U.S.C. 2617(b) and (d).

2. In April and May 1997, respondent Hibbs sought leave under the FMLA to care for his ailing wife. Pet. App. 2a. Petitioner, the Nevada Department of Human Resources, granted his request for the full twelve weeks of FMLA leave and authorized him to use the leave intermittently as needed

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[1] The FMLA's protections also apply to federal civil service employees and certain employees of Congress. See 5 U.S.C. 6381-6387; 2 U.S.C. 1312; 5 C.F.R. Subpt. L, §§ 630.1201-630.1211. Indeed, the protections for federal employees are even more robust, because, unlike petitioners and other state governments, the federal government cannot compel an employee to substitute paid leave for unpaid FMLA leave. Compare 29 U.S.C. 2612(d)(2), with 5 U.S.C. 6382(d), and 5 C.F.R. Subpt. L, § 630.1205(d).

between May and December of 1997. *Ibid.* Hibbs used his leave intermittently until August 5, 1997, after which he did not return to work. *Ibid.* In October 1997, the Department notified Hibbs that he had exhausted his FMLA leave, that no further leave would be granted, and that he must report to work by November 12, 1997. *Id.* at 2a-3a. When Hibbs failed to report to work, he was dismissed. *Id.* at 3a.[2]

Hibbs filed suit in federal district court under the FMLA against petitioners. Pet. App. 3a. Petitioners moved for summary judgment on the ground that the Eleventh Amendment barred Hibbs' federal court action under the FMLA. The district court agreed and granted summary judgment for petitioners. *Id.* at 48a-60a.

3. Hibbs appealed, and the United States intervened, under 28 U.S.C. 2403, to defend the constitutionality of Congress's abrogation of Eleventh Amendment immunity. Pet. App. 4a. The court of appeals reversed. *Id.* at 1a-46a. The court held that the family-care provision of the FMLA was valid legislation under Section 5 of the Fourteenth Amendment because the FMLA "is aimed at remedying gender discrimination," *id.* at 18a, which is subject to heightened scrutiny under the Constitution. The court reasoned that the FMLA's family-care provision should be analyzed differently from this Court's decisions addressing Congress's Section 5 power to enforce rights subject only to rational basis review. *Ibid.* The "history of invidious gender discrimination by states," the court explained, requires sustaining the exercise of Section 5 power unless those attacking the constitutionality of the Act demonstrate that "there is not a widespread pattern of gender discrimination by states regarding the

[2] As noted in the United States' brief in opposition, this Court's decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), casts significant doubt on the validity of Hibbs' FMLA claim. Br. in Opp. 13.

granting of leave to employees to care for sick family members or a historical record of state enforcement of stereotypical family roles." *Id.* at 19a.

The court further ruled, in the alternative, that the family-care provision could be sustained even under the analysis applied to rights subject to rational basis review, because the legislative history "justifies the enactment of the FMLA as a prophylactic measure." Pet. App. 20a. The court cited to "substantial evidence of gender discrimination with respect to the granting of leave to state employees," *ibid.*, and declared that Congress "was acting against a background of state-imposed systemic barriers to women's equality in the workplace that, under recent constitutional doctrine, were undoubtedly unconstitutional." *Id.* at 23a.

The court also held that the family-care provision of the FMLA is congruent and proportional to the gender discrimination that Congress intended to prevent. Pet. App. 36a-42a. The court explained that the family-care provision "focuses only on one type of policy of public and private employers, one that quite directly reflects the interaction between workplace and domestic duties at the core of the unconstitutional state legislation" that restricted women's hours and occupations. *Id.* at 39a.

SUMMARY OF ARGUMENT

Application of the family-leave provision of the Family and Medical Leave Act to States falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. First, Congress made its intent to invoke that power clear in the statute's text and legislative history, both of which refer expressly to the Equal Protection Clause and the Fourteenth Amendment.

Second, the FMLA's family-leave provision enforces the Equal Protection Clause's prohibition on gender discrimination. As this Court's cases have found, this Nation has a lengthy and regrettable history of discrimination on the basis of gender. For generations, state laws and conduct relegated women to a position of social, cultural, economic, and political inferiority. Women were excluded from many forms of employment, and were subjected to discriminatory terms, conditions, and benefits in many of the jobs they were allowed to hold. Unconstitutional employment discrimination by the States perpetuated and reinforced the societal assumption that women were most suited for domestic life, while men were to dominate the commercial sphere. Those laws, which this Court only *began* to strike down a generation ago, reinforced entrenched and persistent stereotypes about the proper roles of women and men in the workforce. Congress considered evidence that, while overt discrimination has diminished, subtle discrimination and the historic structuring of the workplace continue to deny women equal economic opportunity.

The FMLA's family-leave provision is intended to prevent and remedy the enduring effects of unconstitutional discrimination in employment. By establishing a gender-neutral, uniform family-leave floor, Congress sought to erode sex-based employer presumptions that women employees will be less committed to work and absent more because of a need to discharge domestic responsibilities, and thereby to attack discrimination against women in hiring and promotions and against men seeking family-care leave. By equalizing male and female employees' entitlement to family leave, moreover, Congress aimed to transform family leave from its historic genesis as a "women's issue," into a routinized, across-the-board employment benefit. In so doing, Congress intended to deter more subtle forms of discrimination and to

eradicate invidious stereotypes that would otherwise freeze into place the effects of past discrimination.

Third, the family-leave provision is reasonably tailored to advancing those anti-discrimination goals. The statute is narrow in scope and targeted to one particular component of the employment relationship. The establishment of a uniform leave floor, moreover, was designed to prevent discretionary supervisory judgments from perpetuating stereotypical assumptions and to overcome the impracticability of combating covert discrimination on a case-by-case basis. In short, the FMLA's family-leave provision is carefully calibrated to root out the enduring effects of decades of unconstitutional gender discrimination and to force employers to balance the needs of home and worklife as a matter of economic reality, rather than treating family leave as a "problem" attributed to the presence of women in the workforce.

ARGUMENT

THE FAMILY-CARE PROVISION OF THE FAMILY AND MEDICAL LEAVE ACT IS APPROPRIATE SECTION 5 LEGISLATION BECAUSE IT IS A CALIBRATED RESPONSE TO THE ENDURING EFFECTS OF UNCONSTITUTIONAL GENDER DISCRIMINATION

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to Congress, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that encompasses all legislation reasonably designed to enforce the Fourteenth Amendment's guarantees, *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880). Congress's power "includes the authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001); see also

City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation and emphasis omitted). Section 5 thus "gives Congress broad power indeed," *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999) (citation omitted), including the power to abrogate the States' Eleventh Amendment immunity, see, *e.g.*, *Garrett*, 531 U.S. at 364.

Although Section 5 empowers Congress to enact prophylactic and remedial legislation designed to enforce Fourteenth Amendment rights, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). The FMLA's family-leave provision is appropriate Section 5 legislation because it is a reasonable remedy for ongoing gender discrimination, stereotyping, and the enduring effects of decades of unconstitutional gender discrimination by the States. The FMLA does so by attacking one particular aspect of unconstitutional employment discrimination: the disparate treatment of male and female workers in employment decisions and the allocation of family-care leave, based on stereotypes about domestic roles created by past discrimination.

A. Congress Enacted The Family-Care Provision Of The Family And Medical Leave Act Pursuant To Its Section 5 Power

In enacting the FMLA, Congress made clear its intent to enforce the Fourteenth Amendment. The statute's purposes expressly include "promot[ing] the goal of equal employment opportunity for women and men," and, "consistent with the Equal Protection Clause of the Fourteenth Amendment, minimiz[ing] the potential for employment discrimination on

the basis of sex." 29 U.S.C. 2601(b)(4) and (5). The legislative history confirms what the statute's text says. Under the heading "EQUAL PROTECTION AND NON-DISCRIMINATION," both the Senate and House Reports explained that the FMLA "is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment."[3]

Petitioners' argument (Br. 21-27) that Congress did not invoke Section 5 with sufficient clarity erroneously presupposes some obligation on the part of Congress to identify the source of authority for its legislation. Nothing in the text of the Constitution or this Court's decisions requires that. See *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."). To the contrary, this Court has squarely held that Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983). Rather, "congressional legislation [may be] defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment" if the Court is "able to discern some legislative purpose or factual predicate that supports the exercise of that power." *Ibid.*[4]

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[3] S. Rep. No. 3, 103d Cong., 1st Sess. 16 (1993); H.R. Rep. No. 8, 103d Cong., 1st Sess. Pt. 1, at 29 (1993); see also S. Rep. No. 68, 102d Cong., 1st Sess. 25, 40 (1991); H.R. Rep. No. 28, 101st Cong., 1st Sess. Pt. 1, at 15 (1989).

[4] Petitioners' effort (Br. 22-25) to demonstrate that, despite Congress's express textual reference to the Fourteenth Amendment, Congress relied exclusively on the Commerce Clause underscores the dangers of a legal test that declines to take Congress at its word. Petitioners suggest (Br. 24), for example, that the FMLA is "social-policy," rather than Section 5, legislation because there was "wrangling over terms and costs." But petitioners offer no support for the notion that Congress

Congress's express reference to the Equal Protection Clause of the Fourteenth Amendment in the text of the statute and the legislative history provide an ample predicate "to discern" congressional reliance on its Section 5 authority. Indeed, petitioners previously had no difficulty "discern[ing]" that "legislative purpose or factual predicate" (*EEOC*, 460 U.S. at 243 n.18). See Pet. C.A. Br. 24-27; Pet. Second Supp. C.A. Br. 8. Nor did their amicus, the courts below, or any other court of appeals to address the issue.[5]

While petitioners object (Br. 21) to such "*post hoc*" judicial inquiries into the source of congressional authority to legislate, separation of powers principles compel such an undertaking. Courts may assume the constitutionally sensitive task of invalidating legislation that is duly enacted by Congress and the President only where the legislation in fact is beyond Congress's power; courts may not strike down valid legislation simply because petitioners deem the accompanying legislative history to be insufficiently explicit or exhaustive. Indeed, when the power of Congress to enact a civil rights law is questioned, it is "necessary to *search* the Constitution to ascertain whether or not the power is

refrains from "wrangling" (a pejorative for the normal give-and-take of the legislative process) when it legislates under Section 5. Likewise, petitioners contend (*ibid.*) that Congress could not have been remedying discrimination based on gender because it "had *already* remedied leave-based gender discrimination generally through Title VII." However, the existence of other, valid Section 5 legislation addressing the problem of gender discrimination strengthens, rather than weakens, the inference that legislation addressing the same problem with greater particularity is also Section 5 legislation.

[5] See Pacific Legal Found. Br. 4, 22; *Kazmier* v. *Widmann*, 225 F.3d 519 (5th Cir. 2000); *Thomson* v. *Ohio State Univ. Hosp.*, 238 F.3d 424 (6th Cir. 2000) (Table); see also *Kimel*, *supra* (Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, reviewed as Section 5 legislation, although lacking any textual reference to the Fourteenth Amendment, Section 5, or equal protection).

conferred," and to consider even those sources of power that only "in the remotest degree" have potential application to the statute at issue. *United States* v. *Harris*, 106 U.S. 629, 636 (1883).[6]

Petitioners' reliance (Br. 17, 26) on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is misplaced. "*Pennhurst* established a rule of statutory construction to be applied where statutory intent" to reach the States as defendants "is ambiguous," *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991), not a rule that requires Congress to invoke its Section 5 power expressly. *Pennhurst*'s interpretive canon "simply ha[s] no relevance to the question of whether, in this case, Congress acted pursuant to its powers under § 5" because "there is no doubt" that Congress intended to extend the FMLA to the States. *EEOC*, 460 U.S. at 244 n.18.[7]

[6] See also *United States* v. *Butler*, 297 U.S. 1, 61 (1936); *Keller* v. *United States*, 213 U.S. 138, 147 (1909); cf. *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-478 (1980) (opinion of Burger, C.J.) (statute sustained under Section 5 even though Congress never referenced that power); *id.* at 500-502 (Powell, J., concurring).

[7] Petitioners' reliance (Br. 25-26) on *Florida Prepaid Postsecondary Educational Expense Board* v. *College Savings Bank*, 527 U.S. 627, 640 (1999), is likewise mistaken. In that case, this Court declined to consider whether the Patent Remedy Act could be considered appropriate Section 5 legislation to enforce the Just Compensation Clause. This Court explained that, although Congress had been explicit about its intent to enforce the right of procedural due process under the Fourteenth Amendment, the statute and legislative history were devoid of any "suggestion * * * that Congress had in mind the Just Compensation Clause." *Id.* at 642 n.7. But a requirement that Congress identify the constitutional problem to be remedied is different from a requirement that Congress invoke the source of its authority to legislate.

B. The Family And Medical Leave Act Responds To A Long History And Continuing Problem Of Unconstitutional Gender Discrimination By The States

1. *Historic Discrimination By The States*

The "propriety of any § 5 legislation 'must be judged with reference to the historical experience * * * it reflects.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999). While petitioners and their amici largely ignore it, Congress and this Court have repeatedly acknowledged the Nation's "long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality).

> Through a century plus three decades and more of [the Nation's] history, women did not count among voters composing "We the People" * * *. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.

United States v. *Virginia*, 518 U.S. 515, 531 (1996).

State-sanctioned discrimination pervaded virtually every aspect of women's lives. See *Virginia*, 518 U.S. at 536-537 & n.9 (discussing history of discrimination against women seeking higher education); *J.E.B.* v. *Alabama*, 511 U.S. 127, 131 (1994) ("until the 20th century, women were completely excluded from jury service"); *Frontiero*, 411 U.S. at 685 (women could not "hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.").[8] State

[8] See also *United States* v. *Yazell*, 382 U.S. 341, 348-358 (1966) (enforcing state coverture law); see also *id.* at 361 (Black, J., dissenting) (the law of coverture "rests on the old common-law fiction that the husband and wife are one" and that "one is the husband"); *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1875) (denial of the franchise); *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) ("a woman had no legal existence separate from her husband").

"statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *Ibid.* As this Court found, those laws relegated women to a position of "legal, social, and economic inferiority," *Virginia*, 518 U.S. at 534, and created a "Cult of Domesticity" where women were "fitted for motherhood and homelife." Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1547 (Dec. 1991).

Gender discrimination, related stereotypes, and the resulting relegation of women to domestic roles took strong hold in matters of employment. State laws prohibiting women from engaging in broad categories of jobs or imposing special conditions on their employment reinforced the stereotypes of women's appropriate role as homemaker and caregiver. In an oft-cited example, *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1872), this Court upheld an Illinois law that prohibited women from practicing law. *Id.* at 138-139. Justice Bradley asserted that "the civil law, as well as nature herself," required "wide difference in the respective spheres and destinies of man and woman," *id.* at 141 (Bradley, J., concurring):

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic

sphere as that which properly belongs to the domain and functions of womanhood.

Ibid.

Seven decades later, this Court sustained Michigan's prohibition on female bartenders because of the "allowable legislative judgment" that female bartending might "give rise to moral and social problems." *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948). The law permitted women to work in bars owned by their husbands or fathers, however, because they would work subject to the men's "protecting oversight." *Ibid.*[9] Other laws excluded women from mining jobs, manufacturing and mechanical positions, construction work, teaching (at least after marriage), and occupations deemed to involve physically strenuous or hazardous work.[10] "History

[9] See also *Cronin* v. *Adams*, 192 U.S. 108 (1904); *Anderson* v. *City of St. Paul*, 32 N.W.2d 538, 544 (Minn. 1948) ("Just as legislation for the protection of women is permissible * * * likewise, legislation may exclude women from certain employments."); *State* v. *Baker*, 92 P. 1076, 1078 (Or. 1907) ("By nature citizens are divided into the two great classes of men and women, and the recognition of this classification by laws having for their object the promoting of the general welfare and good morals does not constitute an unjust discrimination."); *Sherlock* v. *Stuart*, 55 N.W. 845, 847 (Mich. 1893) ("Some employments, for example, may be admissible for males, and improper for females; and regulations recognizing the impropriety, and forbidding women engaging in them, would be open to no reasonable objection.").

[10] See Women's Bureau, U.S. Dep't of Labor, *Summary of State Labor Laws for Women* 17 (1969) (17 States prohibited women from mining); *Holden* v. *Hardy*, 169 U.S. 366 (1898) (discussing Utah constitutional provision on mining); *Commonwealth* v. *Riley*, 97 N.E. 367, 368 (Mass. 1912) (restriction on work necessary "that the health and endurance of the individual may be insured and the ultimate strength and virility of the race be preserved"); *Board of Rev.* v. *Johnson*, 76 So. 859 (Ala. 1917) (construction); *Grimison* v. *Board of Educ. of City of Clay Ctr.*, 16 P.2d 492, 493 (Kan. 1932) ("[R]eproduction is indispensable to continued existence of the human race, and if, following marriage of a female under

[thus] provides numerous examples of legislative attempts to exclude women from particular areas [of employment] simply because legislators believed women were less able than men to perform a particular function." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 n.10 (1982).

State-sponsored gender discrimination not only significantly limited the employment options and opportunities available to women, but also subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they were permitted to perform. See, *e.g.*, *Frontiero*, 411 U.S. at 679-680 (discrimination in employment benefits). Until 1969, every State had labor laws imposing "protective" restrictions on the employment of women. Pet. App. 25a. The majority of States limited the hours that women could work, on the ground that such laws "tend[] to preserve the health, strength, and vigor of women * * *, thereby conserving the vitality necessary to the proper discharge of their maternal functions, the rearing and education of children, and the maintenance of the home." *People* v. *Elerding*, 98 N.E. 982, 984 (Ill. 1912). In *Muller* v. *Oregon*, 208 U.S. 412 (1908), this Court sustained the constitutionality of such laws. In so holding, the Court noted that at least 19 States "impose[d] restrictions in some form or another upon the

contract to teach, the reproductive function should become operative, and should progress to fruition within the period of employment, successful performance of the contract on the teacher's part might be interfered with or prevented."); *Backie* v. *Cromwell Consol. Sch. Dist. No. 13*, 242 N.W. 389, 390 (Minn. 1932) ("[M]arital duties interfere with that degree of regularity and devotion that is required of teachers."); *Ansorge* v. *City of Green Bay*, 224 N.W. 119, 121 (Wis. 1929) ("Many circumstances * * * might lead to the belief that a male teacher would be more suitable for employment than a female teacher" and "the same may be said with respect to married and unmarried teachers."); *Jones Metal Prods.* v. *Walker*, 281 N.E.2d 1, 6 n.4 (Ohio 1972) (prohibiting the employment of women for jobs such as crossing watchman, gas or electric meter reader, baggage or freight handling, trucking, and jobs requiring heavy lifting).

hours of labor that may be required of women." *Id.* at 419 n.1. Those laws, the Court explained, reflected the widespread assumption that "a proper discharge of [women's] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man." *Id.* at 422; see also *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 395 (1937) (special wage law upheld by refusing to "creat[e] a 'fictitious equality'" between men and women under the Fourteenth Amendment).[11]

Those laws fueled employers' perceptions that women—unlike men—were less desirable, efficient, and economically valuable employees because their work had to be accommodated to competing domestic duties. Indeed, "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment

[11] See also *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 193 & n.7 (1974) (citing statutes restricting night work); *Radice* v. *New York*, 264 U.S. 292, 294-297 (1924) (upholding limit on night work for women "considering their more delicate organism"); *Bosley* v. *McLaughlin*, 236 U.S. 385, 393-396 (1915) (upholding California law restricting work hours); *Miller* v. *Wilson*, 236 U.S. 373 (1915) (same); *W.W. Mac Co.* v. *Teague*, 180 S.W.2d 387, 389-390 (Ky. 1944) (upholding "special working conditions and protective provisions"); *Martinez* v. *Johnson*, 119 P.2d 880 (Nev. 1941); *People* v. *Charles Schweinler Press*, 108 N.E. 639, 640 (N.Y. 1915) (limiting hours because "healthy mothers are essential to vigorous offspring," so "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race"), error dismissed, 242 U.S. 618 (1916); *id.* at 641 (such protection is necessary "not only for their own sakes but, as is and ought to be constantly and legitimately emphasized, for the sake of the children whom a great majority of them will be called on to bear and who will almost inevitably display in their deficiencies the unfortunate inheritance conferred upon them by physically broken down mothers"); *W.C. Ritchie & Co.* v. *Wayman*, 91 N.E. 695, 698 (Ill. 1910) ("the physical structure and maternal functions of women place them at such a disadvantage in the struggle for existence as to form a substantial difference between the sexes").

opportunities." *International Union, United Auto. Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991).

Moreover, employers routinely discriminated against women by paying them less than men for comparable work. See, *e.g.*, *Hogan*, 458 U.S. at 728-729 & n.15; *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 206 (1974); cf. *City of Chicago* v. *Illinois Fair Employment Practices Comm'n*, 410 N.E.2d 136 (Ill. 1980) (janitors paid more than "janitresses" for performing same cleaning tasks).[12]

While discriminatory laws aimed at women ossified society's perceptions about women's capabilities and inexorable domestic responsibilities, other laws impaired men's opportunities to share in the domestic role. See *Stanley* v. *Illinois*, 405 U.S. 645, 646 (1972) (state automatically deprived father of custody of children upon death of unwed mother).[13]

2. *Enduring Unconstitutional Discrimination*

While state action "denying rights or opportunities based on sex" is recorded in "volumes of history," *Virginia*, 518 U.S. at 531, unconstitutional discrimination by state actors

[12] See also Women's Bureau, U.S. Dep't of Labor, *Fact Sheet on the Earnings Gap* (Feb. 1970); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. 486, 489 (1971) (Modern Language Ass'n) (surveying public and private schools, "salary differences between men and women full-time faculty members are substantial," even "at equivalent ranks in the same departments"); *id.* at 510 (Dr. Ann Scott, Nat'l Org. for Women) (women in state employment "suffer some of the worst [pay] discrimination").

[13] See also *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 144-146 (1980) (wives automatically granted benefits upon work-related death of spouse; men denied such benefits upon death of wife unless dependency is proven); *Caban* v. *Mohammed*, 441 U.S. 380 (1979) (unwed mother, but not unwed father, may block adoption); *Orr* v. *Orr*, 440 U.S. 268 (1979) (Alabama statute requiring men, but not women, to pay alimony upon divorce).

on the basis of gender remains a contemporary problem. Indeed, it was not until 1971—well within the professional lifetime of many current state officials and employers—that, "for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws." *Id.* at 532 (citing *Reed* v. *Reed*, 404 U.S. 71 (1971)). And it was not until five years later that a majority of this Court ruled that gender discrimination warrants heightened scrutiny. *Craig* v. *Boren*, 429 U.S. 190, 197-199 (1976).

This Court has explained that a principal basis for the application of heightened scrutiny to state action is the pervasiveness of gender discrimination in state laws, policies, and conduct.[14] In 1973, this Court acknowledged that "it can hardly be doubted that * * * women *still* face *pervasive*, although at times more subtle, discrimination in our educational institutions [and] in the job market." *Frontiero*, 411 U.S. at 686 (emphasis added). In 1994—a year *after* Congress enacted the FMLA—this Court again explained that women have "suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history." *J.E.B.*, 511 U.S. at 136. Two years later, the Court discussed "recent[]" discrimination against women pursuing specialized careers. *Virginia*, 518 U.S. at 544.

Petitioners insist (Br. 48), however, that Congress's legislative hands are tied when it comes to combating gender discrimination in employment because there is no "*current* unconstitutional conduct." That is simply wrong. In addition to *J.E.B.* and *Virginia*, ample lower court decisions attest

[14] See, *e.g.*, *Craig*, 429 U.S. at 218 (Rehnquist, J., dissenting) (heightened scrutiny is triggered by the "pervasive and persistent nature of the discrimination experienced by women"); *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976) (heightened scrutiny based upon the "severity or pervasiveness of the historic legal and political discrimination against women").

that discriminatory attitudes and stereotypical assumptions continue to infect the employment conduct of state actors, including petitioners' amici.[15]

The argument also defies common sense. "Prejudice, once let loose, is not easily cabined," nor easily remedied. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in the judgment in part). Contrary to petitioners' argument (Br. 47-48), over a century of unconstitutional policies, practices, stereotypes, and assumptions about women's roles and abilities did not suddenly vanish "four decades ago" (Pet. Br. 48). Quite the opposite, this Court's adoption just 26 years ago of heightened scrutiny for distinctions based on gender marked the *beginning*, not the end, of the process of dismantling deeply rooted, unconstitutional governmental practices.[16]

That process is ongoing today, as reflected by this Court's continued application of heightened scrutiny to state action

[15] Most recently: see, *e.g.*, *Warren* v. *Prejean*, 301 F.3d 893, 899-903 (8th Cir. 2002); *Knussman* v. *Maryland*, 272 F.3d 625, 634-649 (4th Cir. 2001) (unconstitutional presumption that only a woman could qualify as a "primary care giver" under a facially neutral state statute); *Siler-Khodr* v. *University of Tex. Health Sci. Ctr.*, 261 F.3d 542, 544, 547 (5th Cir. 2001) (wage discrimination), petition for cert. pending (filed Aug. 14, 2002) (No. 02-253); *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 826-828 (6th Cir. 2000) (same); *White* v. *New Hampshire Dep't of Corrs.*, 221 F.3d 254 (1st Cir. 2000); *Thomas* v. *Texas Dep't of Criminal Justice*, 220 F.3d 389 (5th Cir. 2000); *Lathem* v. *Department of Children & Youth Servs.*, 172 F.3d 786, 791-793 (11th Cir. 1999) (disparate discipline).

[16] "[F]our decades ago" (Pet. Br. 48), this Court observed that "woman is still regarded as the center of home and family life." *Hoyt* v. *Florida*, 368 U.S. 57, 62 (1961). Fourteen years *later*, Louisiana reiterated the point. *Taylor* v. *Louisiana*, 419 U.S. 522, 534 n.15, 535 n.17 (1975). And nearly two decades *after Hoyt*, amicus Alabama maintained an alimony law that "announc[ed] the State's preference for an allocation of family responsibilities under which the wife plays a dependent role." *Orr*, 440 U.S. at 279.

based on gender. And the fact that the judiciary only recently came to apply heightened scrutiny underscores the futility of employing the historic record of judicial decisions to limit the scope of Congress's power to remedy discrimination at the core of the Fourteenth Amendment's equal protection guarantee. Together, the searching and the evolving character of judicial review of discrimination on the basis of gender materially undermines any basis for arguing that Congress must stay its remedial legislative hand: "It is not * * * the *judicial power*" but "the power of Congress which has been enlarged" by Section 5. *Ex parte Virginia*, 100 U.S. at 345.

3. ***The Congressional Response***

Congress has taken an active lead in combating gender discrimination in this Nation. Indeed, in the 1960s—before this Court ever struck down a gender-based law as unconstitutional—Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1). Congress also extended both Title VII's ban on gender discrimination and the Equal Pay Act's prohibition on wage discrimination to the States years before a majority of the Court concluded that gender discrimination warrants heightened scrutiny. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (Title VII); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (Equal Pay Act). In the ensuing years, Congress repeatedly enacted laws to eliminate unconstitutional discrimination in employment and the lingering effects of past discrimination and entrenched stereotypes.[17]

[17] See, *e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a); Pregnancy Discrimination Act, 42 U.S.C. 2000e(k); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072.

The FMLA's family-care provision is one component of that interlocking statutory scheme, designed to eliminate workplace discrimination based on "archaic, and overbroad stereotypes about the relative abilities of men and women," *J.E.B.*, 511 U.S. at 131, and to remedy the enduring effects of past discrimination. Congress made clear its intent that the family-care provision would "promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] [C]lause," 29 U.S.C. 2601(b)(5), and "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available * * * on a gender-neutral basis," 29 U.S.C. 2601(b)(4). The FMLA's family-care provision does so in three distinct ways.

First, Congress determined that stereotypical views of the woman's role as a caregiver—the outgrowth of decades of unconstitutional discrimination by States—made employers more reluctant to hire women or promote them to positions of responsibility because employers assume that women will require greater accommodations at work to meet family-care obligations.

> Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.[18]

[18] *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 99th Cong., 2d Sess. 100 (1986) (*Joint Hearing*). See also 139 Cong. Rec. 2262 (1993) (Sen. Mitchell) ("This legislation is as much about giving women an equal economic opportunity as it is about providing a national policy to protect jobs during times of family crises."); 137 Cong. Rec. 25,014 (1991) (Sen. Akaka) ("The [FMLA] will also advance the goal of equal employment

Testimony before Congress thus echoed this Court's view in *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974), that, "[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to [women]."

Second, Congress heard evidence that stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic, family-care responsibilities for male employees. Because employers continue to regard the family as the woman's domain, those who offer family leave to women often deny men similar accommodations or discourage them from taking leave. Indeed, petitioners acknowledge as much. Pet. Br. 24 ("Numerous *men* testified that they had suffered due to inadequate family-care leave."). In fact, Congress found that, "[d]espite the apparent conflict with Title VII of the Civil Rights Act, only 37 percent of the[] companies extended parental leave rights to fathers and often on a different (and less extended) basis than to mothers." H.R. Rep. No. 511, 100th Cong., 2d Sess. Pt. 2, at 24 (1988). "It's fairly flagrant discrimination," Congress was told.[19]

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opportunity for men and women. Due to the nature of the roles of men and women in our society, primary responsibility for family caretaking often falls upon women, and historically affects their careers considerably more than those of men. This reality of life has created the serious possibility that employers may discriminate against employees and job applicants who are women. This legislation will serve to minimize the potential for job discrimination on the basis of sex by ensuring that leave is available on a gender-neutral basis.").

[19] *The Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. Pt. 2, at 536 (1987) (*1987 Senate Hearing*) (Prof. Ross); see also *ibid.* ("[T]here are a number of studies * * * in which it's shown that employers in this country that are giving family leaves to their workers are * * * by and

Third, Congress was concerned that those two mutually reinforcing stereotypes create a self-fulfilling cycle of discrimination that forces women to continue to assume the role of primary family caregiver, 29 U.S.C. 2601(a)(5), which feeds employers' stereotypical views about women's commitment to work and their efficiency or value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination in the hiring and promotion of women that may be difficult to detect on a case-by-case basis. A prophylactic rule that levels the playing field by providing all employees with gender-neutral leave thus directly attacks that subtle, but destructive, discrimination.[20]

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large, giving it only to women, not to men."); *id.* Pt. 1, at 440-441 (Richard Last, Mass. Public School Teacher) ("Our maternity leave provision is typical of many across the state. * * * [It] gives women State-mandated, pay-eligible, disability time off related to child-birth and the other provides for unpaid time off for child-rearing. It is the latter which I feel is discriminatory. There is no reason why this provision should be differentiated on the basis of sex. Not only does this rob the baby of a father's nurturing influence, but it is oppressive to women in that it perpetuates the stereotype that it is the mother's sole responsibility to raise the child."); S. Rep. No. 3, *supra*, at 14-15 (Bureau of Labor Statistics study showing that, while 37% of female private-sector employees were allowed maternity leave, only 18% of male private-sector employees were allowed paternity leave); *Joint Hearing* at 147 (Washington Council of Lawyers) ("[p]arental leave for fathers * * * is rare"; "[w]here child-care leave policies do exist, men, both in the *public* and private sectors, receive notoriously discriminatory treatment in their requests for such leave") (emphasis added); 137 Cong. Rec. at 24,969 (Sen. Bond) ("Paternity leave is extremely scarce.").

[20] See *The Family and Medical Leave Act of 1993: Hearing Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. 50 (1993) (Judith Lichtman) ("But for legislation like this, women's opportunities are truly artificially limited and barred."); *The Family and Medical Leave Act of 1991: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*,

Contrary to petitioners' argument (Br. 30-35), the evidence before Congress demonstrated that those stereotypes and their enduring effects operate in the public, as well as the private, sector. In fact, at the time Congress enacted the FMLA, seven States still had childcare leave or "maternity" laws that applied exclusively to women. See pp. 37-38 & n.31, *infra*.

> [M]en, both in the public and private sectors, receive notoriously discriminatory treatment in their requests for [child-care] leave. * * * * * [B]y providing male workers with the opportunity for parental leave, H.R. 4300 will help eliminate the stereotype—no longer valid in today's working world—that women are exclusively responsible for childcare. By refusing to tie the concept of "pregnancy" to "childcare," this Bill also eliminates the discriminatory problems caused by state "maternity leave" laws.[21]

102d Cong., 1st Sess. 10 (1991) ("the reality today is that women are the primary caregivers for elderly parents"; "[i]t is the daughters, whether biological or through marriage, that account for the majority of caregivers"). Indeed, Congress cited evidence that "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women, the most common caregiver being a child or spouse." H.R. Rep. No. 8, *supra*, Pt. 1, at 24; S. Rep. No. 3, *supra*, at 7.

[21] *Joint Hearing* 147; see also *id.* at 29-30 (Meryl Frank) (finding that "public sector leaves don't vary very much from private sector leaves"); *1987 Senate Hearing* Pt. 2, at 364-374 (Fla. State Rep. Elaine Gordon) (leave is only granted to women; Florida rejected extending leave to men); *id.* Pt. 2, at 29 (Tom Bates, Calif. State Assemblyman) ("[W]hen we examine our laws in California, we come up with the notion that they are really based on the 1950s notion of a sort of Ozzie and Harriet type of family * * * where the man is working and the woman is staying home taking care of the kids."); *id.* Pt. 2, at 33 (Joy Picus, Los Angeles City Councilwoman) ("[O]ur institutions * * * are still delivering services as if the recipients were the stereotypical families."); *id.* Pt. 1, at 385 (testimony of Gerald McEntee, Int'l Pres., AFSCME) ("[T]he vast

Furthermore, Congress acted reasonably in including public employers because much of the discrimination being remedied has its foundation in state law and other state conduct.

Congress adopted the FMLA's gender-neutral family-leave provision to combat the gender-based stereotypes and employment discrimination it had identified. By protecting men and women equally, Congress designed the FMLA to reduce the viability of gender as a proxy for leave entitlement, job commitment, or familial caregiving. By creating an across-the-board, routine employment benefit for all eligible employees, moreover, Congress sought to ensure that family-care and parental leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that empioyers could not evade leave obligations simply by hiring men.[22] Furthermore, because individual applications of unspoken stereotypes and unrecorded employer assumptions could be very difficult to litigate under pre-existing anti-discrimination laws, Con-

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majority of [public employment] contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave."); *The Family and Medical Leave Act of 1989: Hearing on H.R. 770 Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. 271 (1989) (Concerned Alliance of Responsible Employers) (thirteen States grant family leave to women but not men).

[22] See H.R. Rep. No. 135, 102d Cong., 1st Sess., Pt. 1, at 28 (1991) ("[T]he FMLA avoids providing employers the temptation to discriminate."); H.R. Rep. No. 28, *supra*, Pt. 1, at 15 ("The bill will provide no incentive to discriminate against women, because it addresses the leave needs of workers who are young and old, male and female, married and single."); *The Family and Medical Leave Act of 1989: Hearing Before the Subcomm. on Children Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 235 (1989) *(1989 Senate Hearing)* ("[I]n order to remove any incentive to discriminate against women," law must "provide job protection for family leave for all workers.").

gress concluded that the FMLA's family-leave provision fills a gap in the legal regime opposing unconstitutional gender discrimination and stereotypes.[23]

4. ***The FMLA Family-Care Provision Is Proper Section 5 Legislation***

a. **Congress can legislate against overt and subtle gender discrimination**

The FMLA's family-care provision reflects an appropriate exercise of Congress's Section 5 power to combat gender discrimination and stereotypes in the workplace. As an initial matter, there can be no serious question that the Section 5 power to abrogate Eleventh Amendment immunity extends to legislation combating gender discrimination. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452-456 (1976) (gender discrimination claim under Title VII validly abrogates Eleventh Amendment immunity). Congress's interest in eradicating gender discrimination is "compelling," *Roberts* v.

[23] See S. Rep. No. 68, *supra*, 35 ("Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect."); H.R. Rep. No. 8, *supra*, Pt. 2, at 11 ("If an employer denies benefits to its work force, it is in full compliance with anti-discrimination laws because it treats all employees equally. Thus, while Title VII, as amended by the Pregnancy Discrimination Act, has required that benefits and protection be provided to millions of previously unprotected women wage earners, it leaves gaps which an anti-discrimination law by its nature cannot fill."); H.R. Rep. No. 135, *supra*, Pt. 2, at 5 (same); *1989 Senate Hearing*, at 232 (discussing deficiencies of anti-discrimination law); *1987 Senate Hearing* Pt. 1, at 257 (AFSCME) ("This legislation is necessary to fill gaps in previously passed anti-discrimination laws."); *id.* Pt. 2, at 171 (Peggy Montes, Chicago Mayor's Comm'n on Women's Affairs) ("[I]t is not enough to have abstract antidiscrimination policies. We also have to provide employers with a 'threshold' from which they can start to build employee policies to meet the needs of men and women."); cf. *Kahn*, 416 U.S. at 353 ("firmly entrenched practices are resistant to such pressures" as Title VII).

United States Jaycees, 468 U.S. 609, 623 (1984), and "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women [is] * * * an important governmental objective," *Califano* v. *Webster*, 430 U.S. 313, 317 (1977).

Petitioners' argument (Br. 28-30) that Congress was only legislating with respect to leave benefits mistakes the remedy for the problem. Congress did not design the FMLA's adjustment of leave benefits as an end in itself; it is the means Congress chose to the end of eliminating gender discrimination and stereotyping against both women in hiring and promotions and men in obtaining family-care leave.

b. **Congress passed the FMLA to combat unconstitutional discrimination and gender-based stereotypes**

Like other Section 5 legislation, the FMLA's family-care provision targets the enduring, yet hard-to-detect, effects of manifold state statutes and practices that, for generations, have limited women's opportunities to participate in the workforce on equal terms. This Court's cases now make clear that state action denying women or men equal employment opportunities based on "overbroad generalizations about the different talents, capacities, or preferences of males and females" violates the Fourteenth Amendment. *Virginia*, 518 U.S. at 533; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 643 (1975); *id.* at 652 ("a father, no less than a mother, has a constitutionally protected right" to care for his children). It follows that Congress's Section 5 authority may displace such invidious generalizations directly.

Congress, moreover, could reasonably infer that the disproportionate burden of family-care responsibilities that women continue to shoulder, and the attendant limitations on their employment and advancement that Congress found, were the outgrowth of decades of unconstitutional state

action restricting women to domestic roles, and thus reinforced and "reflect[ed] archaic and stereotypic notions." *Hogan*, 458 U.S. at 725; cf. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one [gender] than another").

Indeed, the nexus between past discrimination and current stereotypes about family leave is illustrated by petitioner's own amicus. The Pacific Legal Foundation objects (Br. 24) that "[r]eality * * * intrudes" to make the FMLA unnecessary. But it is precisely the Pacific Legal Foundation's "reality" of gender-based salary differentials, "society['s] traditional[] view[]" of "women as primary caretakers," and male employees' concerns about "the detrimental effect on their careers" of caring for their family (concerns that women workers are assumed not to share), *ibid.*, that the FMLA combats. Leave policies that "freeze the effect[s] of past discrimination," *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966), and outdated stereotypes fall squarely within Congress's Section 5 authority; Congress need not tolerate "the very stereotype the law condemns." *J.E.B.*, 511 U.S. at 138.

c. The FMLA rests on an established record of gender-based discrimination by the States

Section 5 legislation, like the FMLA, that Congress designed to combat employment discrimination, "outdated misconceptions," *J.E.B.*, 511 U.S. at 135, and entrenched stereotypes—discrimination that has triggered and continues to trigger the application of heightened scrutiny by this Court —has been sustained as appropriate Section 5 legislation without determining whether the legislative record documented a history of constitutional violations by the States.[24]

[24] See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (nationwide ban on literacy tests upheld, despite geographically limited evidence of abuse);

Furthermore, petitioners' argument is in substantial tension with *Fitzpatrick*, *supra*, where this Court sustained the abrogation of Eleventh Amendment immunity for gender discrimination under Title VII. The Court did so without inquiring into the extent of evidence before Congress in 1972 of a history of unconstitutional gender discrimination by the States. Indeed, while the legislative record supporting the extension of Title VII to the States in 1972 contains specific evidence and findings of race discrimination by state and local government employers, that record contains no specific data or findings regarding women employees in state or local governments.[25]

Katzenbach v. *Morgan*, 384 U.S. 641, 649 (1966) (Harlan, J., dissenting) (literacy test ban added to statute on the floor of Congress); cf. *Lopez* v. *Monterey County*, 525 U.S. 266 (1999) (deterrent provision of the Voting Rights Act sustained without examination of the legislative record); *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986) (Title VII's ban on religious discrimination was added "on the floor of the Senate with little discussion").

[25] See H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971); S. Rep. No. 415, 92d Cong., 1st Sess. (1971); 118 Cong. Rec. 1840 (1972) (Sen. Javits) (specifically citing evidence of racial discrimination by state and local governments, but referring only to "overall figures" for sex discrimination); *id.* at 1816-1819, Exh. 1 (findings only as to racial discrimination); *id.* at 4935 (Tables). The isolated references made to the Constitution in the context of gender discrimination noted only the unremarkable propositions that the Constitution prohibits discrimination by State and local governments, S. Rep. No. 415, *supra*, at 10; 118 Cong. Rec. at 1816 (Sen. Williams), and that race- or sex-based discrimination can violate the Constitution, *id.* at 1412 (Sen. Byrd). Congressional hearings on the 1972 amendments also were silent on the subject of unconstitutional gender discrimination by state governments. See *Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity*

Those cases recognize the commonsense proposition that, where the courts already have acknowledged that the States have engaged in a long-term and widespread pattern of unconstitutional conduct such that heightened scrutiny is appropriate—as for racial and gender discrimination—little would be gained by having Congress belabor the obvious in legislative history that it has no constitutional obligation to create in the first place. Cf. *Kimel*, 528 U.S. at 91 (noting that an examination of the legislative record is not necessary in all circumstances).[26]

Petitioner's reliance (Br. 30-35) on the Court's discussion of legislative history in *Kimel*, 528 U.S. at 68-69; and *Garrett*, 531 U.S. at 368-372, is misplaced. Those cases involved exercises of the Section 5 power that pertained to state conduct subject only to rational basis review—that is, state conduct that, by definition, lacked any comparable judicially recognized history of pervasive discrimination. See *Garrett*, 531 U.S. at 366 (disability discrimination); *Kimel*, 528 U.S. at 83 (age discrimination); see also *Flores*, 521 U.S. at 512-514

Enforcement Procedures: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor, 91st Cong., 1st & 2d Sess. (1969-1970); *Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 91st Cong., 1st Sess. (1969).

[26] See, *e.g.*, *United States* v. *Morrison*, 529 U.S. 598, 612 (2000); *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 213 (1997) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."); *United States* v. *Lopez*, 514 U.S. 549, 562-563 (1995) ("We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."); *Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989) ("Congress is not required to build a record in the legislative history to defend its policy choices.").

(neutral laws affecting religious exercise).[27] In the absence of any "extensive litigation and discussion of the constitutional violations" in judicial decisions, *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), the Court was forced to resort to the legislative record to determine whether there was, in fact, a pattern of unconstitutional conduct for Congress to remedy. This Court has already answered that question with respect to gender discrimination.

By studiously avoiding any discussion of that well-documented history of unconstitutional gender discrimination by the States in employment, petitioners ask this Court to ignore the unconstitutional genesis of the problem Congress addressed, and instead look exclusively for a lengthy history of unconstitutional administration of leave policies. But in light of the long history of state laws restricting the ability of women to work in the first place, it is not surprising that there is not an equally lengthy history of discrimination in administering one particular type of employment benefit.

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[27] Petitioners' characterization (Br. 43) of *Flores* as involving the application of Section 5 jurisprudence to state conduct subject to heightened scrutiny is baffling. As this Court explained in *Flores*, the entire point of the Religious Freedom Restoration Act was to impose a standard of heightened scrutiny on conduct that this Court held, in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), did not warrant such scrutiny. *Flores*, 521 U.S. at 512-514. And it was the Act's across-the-board imposition of such heightened scrutiny that, in large part, rendered it an incongruent and disproportionate legislative remedy. *Id.* at 532-535. *United States* v. *Morrison*, *supra* (cited at Pet. Br. 43), likewise, is of no help to petitioners. The Court had no occasion in that case to address what type of legislative record, if any, would be necessary to sustain Section 5 legislation remedying unconstitutional gender discrimination, because the relevant provision of the Violence Against Women Act of 1994 regulated only private conduct and thus independently ran afoul of the "time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action." 529 U.S. at 621.

Cf. *J.E.B.*, 511 U.S. at 131 (applying heightened scrutiny to gender-based peremptory challenges despite their being "a relatively recent phenomenon").

More fundamentally, petitioners ask the Court to focus on the wrong question. Congress enacted the FMLA's family-care provision to combat gender discrimination and stereotypes in hiring and promotion—an area where the record of unconstitutional conduct by state employers is well-documented in court decisions and the legislative history of numerous federal anti-discrimination laws.[28] The FMLA does so by equalizing the opportunity of all employees—regardless of gender—to obtain family leave. That remedy directly counteracts subtle discrimination in the hiring and promotion of women based on stereotypes about their relative needs and desire to take leave. By guaranteeing equal leave opportunities for all employees—not just for female employees or "working mothers"—Congress sought to take considerations concerning family leave out of the hiring and promotion equation for women. The FMLA thus attacks the foundation of employer stereotypes that Congress found historically have produced discrimination in the hiring and promotion of female employees. More specifically, in order to eliminate barriers to the employment and advancement of women grounded in long-held stereotypes about the allocation of domestic responsibilities, Congress passed the FMLA to transform family leave from a women's issue into an across-the-board employment benefit or, as petitioners repeatedly interject (Br. 23-25), a gender-neutral "labor standard." The FMLA thus pretermits employers' "[s]ex-based

[28] "After Congress has legislated repeatedly in an area of national concern," such as combating gender discrimination in employment, "its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring).

generalizations [that] both reflect and reinforce 'fixed notions concerning the roles and abilities of males and females.'" *Nguyen* v. *INS*, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) (quoting *Hogan*, 458 U.S. at 725).

In any event, petitioners' cramped vision of the constitutional foundation for congressional action cannot be reconciled with this Court's Section 5 precedents, which give Congress a dynamic and robust role in deterring current and remedying past discrimination. For example, in upholding literacy test bans under the Voting Rights Act (see *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966)), this Court has never limited Congress's legislative authority to circumstances where extensive court decisions or a lengthy legislative history specifically demonstrates the unconstitutionality of such tests. See *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (Court unanimously sustains the facial constitutionality of literacy tests); *Morgan*, 384 U.S. at 669 & n.9 (Harlan, J., dissenting) (literacy test ban added to the Voting Rights Act on the floor of Congress). Similarly, in *Oregon* v. *Mitchell*, *supra*, this Court upheld Congress's ban on durational residency requirements for voting, 42 U.S.C. 1973aa-1(a)(5), without separately deciding that the residency requirement was unconstitutional or that the States had engaged in a long pattern of unconstitutional discrimination in imposing such residency requirements. 400 U.S. at 285-287 (Stewart, J., joined by Burger, C.J., & Blackmun, J.), 236-239 (Brennan, White, Marshall, JJ.), 147-150 (Douglas, J.). In fact, a year earlier, the Court had upheld a similar residency requirement against constitutional challenge. *Drueding* v. *Devlin*, 380 U.S. 125 (1965) (mem.); see also *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965).[29]

[29] Likewise, the Court has sustained the constitutionality of preclearance requirements for changes in States' voting procedures despite argu-

Those decisions demonstrate that the absence of substantial judicial precedent invalidating subtle forms of discrimination, which are difficult to prove on a case-by-case basis, does not signify either the absence of a problem for Congress to remedy or a lack of congressional authority. Quite the opposite, such silence may simply indicate that the historical permissibility of widespread, pervasive, and stubborn overt forms of discrimination, already documented in the Court's decisions, previously had made resort to subtle, facially neutral forms of discrimination unnecessary.

This Court's consistent application of heightened judicial scrutiny to state conduct reinforces the point. The long-standing judicial recognition of widespread, pervasive, and deeply rooted unconstitutional gender discrimination has been deemed sufficient to justify such probing judicial oversight, even if the particular form the discrimination has assumed is new. See, *e.g.*, *J.E.B.*, 511 U.S. at 131.

Moreover, petitioners' narrow analysis ignores the broader reality of the workplace. Petitioners do not and cannot contest the Nation's long history of gender discrimination, the pervasiveness of discriminatory laws and attitudes, or the stereotypes about male and female roles that those discriminatory laws and practices reinforced. Nor can petitioners deny that gender discrimination took firm root in matters of state employment, that law after law intentionally limited women's employment opportunities based on stereotypical assumptions about their primary responsibility for family caretaking, and that discriminatory attitudes pervaded the workplace, affecting not just hiring and promotions, but also employee compensation, working conditions, and benefits. Unable to dispute that background,

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ments that a particular jurisdiction is innocent of unconstitutional discrimination. See *Lopez* v. *Monterey County*, *supra*; *City of Rome* v. *United States*, 446 U.S. 156 (1980).

petitioners instead ask this Court to ignore it and to pretend that all of those pervasive discriminatory attitudes and stereotypes suddenly disappeared when it came to making hiring and promotion decisions for women and family-leave decisions for men. Nothing in Section 5 jurisprudence requires Congress or this Court to accept such a counterfactual assumption.

Finally, petitioners' approach depreciates congressional resourcefulness in combating deeply rooted and entrenched forms of discrimination. Less than twenty years elapsed between *Craig* v. *Boren*, when this Court *commenced* a concerted judicial process of dismantling decades of unconstitutional gender discrimination, and Congress's enactment of the FMLA. During that period, Congress perceived the battle shifting from prohibiting outright gender discrimination in employment to removing the subtle, yet enduring effects of entrenched stereotypes and recently repealed discriminatory laws. Indeed, this Court's decision in *Hogan*, *supra*, invalidating "the stereotyped view of nursing as an exclusively woman's job," 458 U.S. at 729, predated Congress's initial consideration of a family leave law by only a few years. Accordingly, as with congressional bans on literacy tests, which combat the enduring effects of past racial discrimination in education and voting (see *Gaston County* v. *United States*, 395 U.S. 285 (1969)), and Title VII's disparate impact test, which attacks more subtle and covert forms of racial and gender discrimination in employment (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 432 (1971)), legislation aimed at more subtle, second-generation forms of discrimination is unlikely to rest upon the type of lengthy and particularized history of constitutional violations that petitioners seek.

Indeed, Congress could reasonably conclude that it is precisely the judicial condemnation of the most overt and deeply entrenched forms of discrimination that often gives

rise to more subtle forms of second-generation discrimination, which are often facially neutral, but keyed to stereotypes resulting from the history of more overt discrimination. See *Hogan*, 458 U.S. at 726 (noting employers' "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women" in the workplace). The shortage of judicial precedent condemning such second-generation discrimination accordingly should not disable Congress from responding. Insistence on well-documented proof of particularized constitutional violations is "hardly practicable" if, "during most of our country's existence * * * women were completely excluded" from many employment opportunities. *J.E.B.*, 511 U.S. at 131. In short, it is the fact of enduring discrimination, not a judicial pedigree for its manifestation in a particular form, that triggers Congress's Section 5 power; Section 5 empowers Congress to eliminate unconstitutional racial and gender discrimination, not merely push it underground.

d. The existence of state leave laws and policies does not diminish Congress's Section 5 power

Petitioners and amicus Alabama place great emphasis (Br. 32-35; Alabama Br. 5-14, 18-22) on the existence of state leave laws and policies at the time the FMLA was enacted. Again, petitioners and Alabama misunderstand the purpose of the FMLA's family-leave provision. Congress was not merely concerned with the creation of leave policies for their own sake. Congress's goal was to adjust family leave policies in order to eliminate their perpetuation of "the role-typing society has long imposed" on male and female workers, *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975), and thereby dismantle gender-based barriers to the hiring, retention, and promotion of women in the workplace. In pursuing that goal,

Congress could reasonably conclude that existing state leave laws fell short of the mark.[30]

Petitioners and Alabama, moreover, significantly overstate the coverage of pre-FMLA state laws. Alabama contends that, at the time of the FMLA's passage, "34 States * * * had adopted statutes authorizing varying forms of family and medical leave for public or private employees." Amicus Br. 14 (citing Comm'n on Family & Med. Leave, U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 45 (1996) (citing Women's Bureau, U.S. Dep't of Labor, *State Maternity/Family Leave Law* (1993))). But Alabama's resort to the phrase "varying forms" robs the argument of analytical force.

First, seven of those 34 States had childcare leave provisions that applied to *women only*. Indeed, Massachusetts required that notice of its leave provision be posted only in "establishment[s] in which females are employed."[31] In

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[30] See *1987 Senate Hearing* Pt. 1, at 470 (Richard Licht, Lt. Gov. of Rhode Island) ("But ultimately it makes sense to have a national policy. It's fair to all the States as they are * * * on the same level playing field, and that we don't have that patchwork."); *id.* Pt. 2, at 380 (Debra Merchant, Ky. Comm'n on Women) ("[P]rovisions for additional leave and benefits are inadequate and inconsistent from state to state."); 136 Cong. Rec. 9963 (1990) (Rep. Miller) ("States have not picked up the gauntlet either. * * * [L]ess than half the States have some type of parental leave policy."); 137 Cong. Rec. at 24,975 (Sen. Kennedy) ("reforms vary widely from State to State" and are "far from enough").

[31] Mass. Gen. Laws Ann. ch. 149, § 105D (West 1999) (providing leave to "female employee[s]" for childbirth or adoption); see also 3 Colo. Code Regs. § 708-1, R. 80.8 (2002) (pregnancy disability leave only); Iowa Code Ann. § 216.6(2) (West 2000) (former § 601A.6(2)) (same); Kan. Admin. Regs. 21-32-6(d); La. Rev. Stat. Ann. § 23:1006(A)(2) (West Supp. 1993) (repealed 1997) (pregnancy disability leave only); N.H. Rev. Stat. Ann. § 354-A:7(VI)(b) (1995 & Supp. 2000) (pregnancy disability leave only);

addition, petitioner Nevada—whose policies fell so short that it is excluded from Alabama's list—allowed its employees to use accrued sick leave "for adoption purposes or as *maternity* leave," Pet. Br. App. A-3 (emphasis added), but not for paternity leave. Those States' practices thus illustrate, rather than counteract, the very problem that Congress designed the FMLA to remedy: the state laws reinforced employers' stereotypes of men as valuable workers freed from familial responsibilities. See 29 U.S.C. 2601(a)(6); *Schafer* v. *Board of Pub. Educ.*, 903 F.2d 243 (3d Cir. 1990) (public school board denied male teacher child-rearing leave that was available to female employees).

Second, thirteen of Alabama's 34 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member.[32] Nor did petitioner or amici Alabama, Indiana, Nebraska, Ohio, or Utah. See *State Maternity/Family Leave Law*, *supra*, at 3, 6, 8, 10, 12. Those States thus did nothing to combat the particular, more subtle forms of gender discrimination targeted by the FMLA's family-leave provision.

Third, many States provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands. See 3 Colo. Code

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Tenn. Code Ann. § 4-21-408(a) (1998) (four-month maternity leave for female employees only).

[32] See 3 Colo. Code Regs. § 708-1, R. 80.8 (2002); Del. Code Ann., title 29, § 5116 (1997); Iowa Code Ann. § 216.6(2) (West 2000); Kan. Admin. Regs. 21-32-6; Ky. Rev. Stat. Ann. § 337.015 (Michie 2001); La. Rev. Stat. Ann. § 23:1008(A)(2 (West Supp. 1993); Mass. Gen. Laws Ann. ch. 149, § 105D (West 1999); Mo. Ann. Stat. § 105.271 (West 1997 & Supp. 2002); N.H. Rev. Stat. Ann. § 354-A:7(VI)(b) (1995 & Supp. 2000); N.Y. Lab. Law § 201-c (McKinney's 2002); Tenn. Code Ann. § 4-21-408(a) (1998); *State Maternity/ Family Leave Law*, *supra*, at 12 (citing a Texas appropriations rider and a Virginia personnel policy).

Regs. § 708-1, R. 80.8 (2002); Kan. Admin. Regs. 21-32-6; N.H. Rev. Stat. Ann. § 354-A:7(VI)(b) (1995 & Supp. 2000). Amicus Oklahoma offered only a system by which employees could voluntarily donate leave time for colleagues' family emergencies. Okla. Stat. Ann. title 74, § 840-2.22 (historical note) (West 1995 & Supp. 2002). Congress could reasonably conclude that such discretionary family-leave programs would do nothing to combat, and could give free rein to, the very stereotypes about the roles of male and female employees that Congress sought to eliminate:

> [I]n the absence of a national minimum standard for granting leave for parental purposes, the authority to grant leave and to arrange the length of that leave rests with individual supervisors, leaving * * * employees open to discretionary and possibly unequal treatment. The lack of consistency also leads to differences between how men and women are treated in the case of maternity and paternity leaves.

H.R. Rep. No. 135, *supra*, Pt. 2, at 4-5; cf. *Knussman* v. *Maryland*, 272 F.3d 625, 634-649 (4th Cir. 2001) (State personnel director applied an irrebuttable presumption that only a woman could qualify as a "primary care giver"). In addition, four States provided leave only through administrative regulations or personnel policies, which Congress could reasonably conclude offered significantly less firm protection than a federal law. See 3 Colo. Code Regs. § 708-1, R. 80.8 (2002); Kan. Admin. Regs. 21-32-6; Wis. Admin. Code § DWD 225 (2002) (former § IND 86); *State Maternity/ Family Leave Law*, *supra*, at 12 (Virginia).[33]

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[33] Other states may have had such policies on a formal or informal basis, although the Department of Labor's report did not reflect them. Because such policies are readily subject to change and may not even be legally enforceable against the State, Congress could reasonably consider them insufficient protection against gender discrimination and stereo-

In sum, just as state laws against race discrimination have neither eradicated the problem nor undermined the basis for subjecting state employers to federal prohibitions,[34] Congress could reasonably conclude that the wide variety of state leave policies did not effectively combat—and in many cases perpetuated—stereotypical employer assumptions about the respective domestic responsibilities of male and female employees, and thus were generally ineffective in combating the lingering effects of prior official discrimination in employment policies and practices.

C. The Family And Medical Leave Act's Family-Leave Provision Is Reasonably Tailored To Remedying And Preventing Unconstitutional Gender Discrimination In Employment

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid*, 527 U.S. at 639. Congress, however, may "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and con-

typing. Alabama also relies on the statement that, in 1993, 48 states had policies permitting state employees to use sick leave to care for ill family members. Br. 9 (citing Workplace Economics, Inc., *1993 State Employee Benefits Survey* 19). That argument overlooks the rate at which state employees accrue and use sick leave for their own illnesses. See *1993 State Employee Benefits Survey*, *supra*, at 20-21 tbl. 3 (rate of accrual). Congress could reasonably conclude that employees would not generally have sufficient sick leave left over to make those programs an adequate, gender-neutral bulwark against the perpetuation of family-care stereotypes.

[34] See, *e.g.*, S. Rep. No. 415, *supra*, at 19 (37 States had equal employment laws at the time Title VII was extended to the States). Virtually all States had such laws by the time of the 1991 Civil Rights Act. W. Holloway & M. Leech, *Employment Termination: Rights & Remedies* App. A (1993).

troversies upon individual records." *Fullilove* v. *Klutznick*, 448 U.S. 448, 501-502 n.3 (1980). Accordingly, "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel*, 528 U.S. at 81. Rather, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Lopez* v. *Monterey County*, 525 U.S. 266, 282-283 (1999). The FMLA's family-leave provision is a congruent and proportional means of combating the gender-discrimination problems Congress identified.

First, because "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender," 29 U.S.C. 2601(a)(6), Congress ensured that "leave is available * * * on a gender-neutral basis." 29 U.S.C. 2601(b)(4). Congress thus directly overrode the discriminatory, gender-specific leave laws of a number of States. See pp. 37-38 & note 31, *supra*. By setting a minimum standard of family leave for *all* eligible employees, the FMLA addresses facially discriminatory state laws and, more broadly, combats the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in subtle discrimination by basing hiring and promotion decisions on stereotypes about the allocation of family caregiving responsibilities. "[T]he avoidance of [such] sex-based distinctions is the hallmark of equal protection." *Nguyen*, 533 U.S. at 82 (O'Connor, J., dissenting). The FMLA pursues that equal protection goal by transforming family leave from an ad hoc burden on employers, reflexively attributed to the presence of women in the workforce, into an across-the-board employee entitlement and a routine, unavoidable cost of doing business. In Congress's judgment, it

was only by altering employers' perceptions of the appropriate relationship between employees and domestic responsibilities in that manner that less overt forms of discrimination could be deterred and the enduring effects of stereotypical assumptions about female workers and "fixed notions concerning the roles and abilities of males and females" could be eliminated. *Hogan*, 458 U.S. at 725.

This Court has held that a proper "remedial decree" for unconstitutional gender discrimination is to put women "in the position they would have occupied in the absence of [discrimination]." *Virginia*, 518 U.S. at 547 (brackets in original; internal quotation marks omitted); see also *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965) ("[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."). Congress could reasonably conclude that, in the absence of gender discrimination in employment, employers long ago would have structured the workplace to accommodate the competing domestic responsibilities of both male and female employees on a gender-neutral basis. Indeed, Congress found that "our workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities"—a structuring of workplaces that reflected an assumption that women would assume those domestic responsibilities. H.R. Rep. No. 8, *supra*, Pt. 1, at 17; see also Pet. App. 31a ("State support for stereotypical gender roles had allowed American employers —including the [S]tates—to develop and function without accommodating workers' home responsibilities during emergencies."). By refocusing employers' approach to family leave and making it a standard employment benefit, rather than a "women's issue," the FMLA thus "aims to 'eliminate so far as possible the discriminatory effects of the past' and to 'bar like discrimination in the future.'" *Virginia*, 518 U.S.

at 547 (brackets and citation omitted); see *id.* at 550 n.19 (Equal Protection Clause can require modification of facilities and programs to ensure equal access).

Second, in addition to remedying continuing and past acts of discrimination, Congress may regulate facially constitutional practices that impermissibly carry forward the effects of state-sponsored discrimination and sex-based stereotypes, and may adopt prophylactic rules designed to counteract subtle discrimination. In *Gaston County*, *supra*, this Court held that Congress's Section 5 authority includes the power to prohibit apparently valid literacy tests because they would perpetuate "inequities" arising from past discrimination in voting and education that "systematically deprived [Gaston County's] black citizens of the educational opportunities it granted to its white citizens." 395 U.S. at 297. In so holding, the Court "accept[ed] * * * as true" the County's assertions that "it has made significant strides toward equalizing and integrating its school system" and that it administered its literacy test "in a fair and impartial manner." *Id.* at 296. The Court nevertheless concluded that those claims "fall wide of the mark" because, after years of discrimination, "'[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form." *Id.* at 296-297; see *Lopez*, 525 U.S. at 282 (preclearance procedures of Voting Right Act can be applied to "States that have not been designated as historical wrongdoers").[35]

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[35] See also *Morrison*, 529 U.S. at 619; *J.A. Croson Co.*, 488 U.S. at 490 (opinion of O'Connor, J.) (Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations"); *Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.) ("[C]ongressional authority [under Section 5] extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination."); *id.* at 502 (Powell, J.,

The propriety of the FMLA as Section 5 legislation thus does not, as petitioners suppose (Br. 32-35), turn upon whether the States have in recent years "made significant strides toward equalizing" employment opportunities for women, *Gaston County*, 395 U.S. at 296; but see pp. 17-20 & note 15, *supra* (documenting continuing discrimination). Nor does it turn on whether the States' current leave policies operate in a facially "fair and impartial manner," *Gaston County*, 395 U.S. at 296; but see pp. 24-25 & note 21, *supra*. Rather, the FMLA is appropriate Section 5 legislation because Congress concluded that, absent uniform leave policies, even seemingly neutral employment practices would reflect lingering stereotypes about the domestic responsibilities of men and women, and "would serve only to perpetuate the[] inequities" arising from decades of unconstitutional state discrimination in employment "in a different form." *Gaston County*, 395 U.S. at 297.[36] Section 5, in short, permits Congress not just to prohibit States from engaging in future discrimination; Congress also may compel States to repair the enduring effects of past unconstitutional conduct and to prevent the perpetuation of more "subtle," *Frontiero*, 411 U.S. at 686, and "covert[]," *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 273 (1979), forms of gender discrimination. "Difficult and intractable problems often require powerful remedies." *Kimel*, 528 U.S. at 88; see also *South*

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concurring) ("It is beyond question * * * that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."); *City of Rome*, 446 U.S. at 176-177 (under its Civil War Amendment powers, Congress may prohibit conduct that is constitutional if it perpetuates the effects of past discrimination); *South Carolina*, 383 U.S. at 325-333.

[36] See also *1987 Senate Hearing* Pt. 1, at 15 (Jim Weeks, United Mine Workers) ("[I]f we just leave things to their course, this might replicate existing patterns of inequality.").

Carolina, 383 U.S. at 334 ("exceptional conditions can justify legislative measures not otherwise appropriate").

Third, unlike the statutes at issue in *Flores*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted—it affects only one aspect of the employment relationship. And in so doing, the FMLA does not leave employers grappling to comply with variable or generalized standards of conduct. The FMLA's leave requirements are specific and straightforward. In addition, the FMLA requires only unpaid leave, 29 U.S.C. 2612(a)(1), and excludes certain employees, including state employees, who hold high-ranking or sensitive positions, 29 U.S.C. 2611(2), 2611(3), 203(e)(2)(C). The Act requires employees to give notice of foreseeable leave, 29 U.S.C. 2612(e), and permits employers to require certification by one or more health care providers of the need for leave, 29 U.S.C. 2613. The relevant provisions of the Act apply only to employees who have been employed for at least twelve months and who have performed "at least 1,250 hours of service with [the] employer during the previous 12-month period." 29 U.S.C. 2611(2)(A)(ii).

Fourth, Congress calibrated the FMLA's provisions based on extensive testimony from "a wide range of employers that already provide family and medical leave." See S. Rep. No. 3, *supra*, at 12. From "this testimony, and from a wide body of study and research data," Congress concluded that "family and medical leave is cost-effective in terms of reduced hiring and training costs, turnover, and absenteeism." *Id.* at 12-13. In choosing twelve weeks as the appropriate leave floor, moreover, Congress chose "a middle ground, a period considered long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.'" *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1164 (2002) (quoting 29 U.S.C. 2601(b)).

Fifth, Congress created a narrow cause of action to encourage employers' compliance with the law. The damages recoverable are strictly defined and measured by actual monetary losses. 29 U.S.C. 2617(a)(1)(A)(i)-(iii).[37] The damages action does no more than put the employee in the position he or she would have occupied had the employer complied with the terms of federal law. See *Ragsdale*, 122 S. Ct. at 1162 (discussing the "important limitations of the [FMLA's] remedial scheme"). Congress could reasonably conclude that such a cause of action is particularly necessary in remedying employment discrimination, because it ensures that employers do not deem non-compliance to be cost-effective, and it provides a practical incentive for individuals to exercise their FMLA rights without imperiling their livelihood.[38]

Moreover, in a context where, unlike *Flores*, *Kimel*, or *Garrett*, Congress enacts remedial legislation under Section 5 to address a form of discrimination to which this Court applies heightened scrutiny, Congress should have greater latitude to fashion a remedy. As noted, judicial prohibitions of overt discrimination may give rise to more subtle forms of second-generation discrimination. Identifying and fashioning prophylactic rules to prevent such discrimination are

[37] Courts generally have held that the FMLA does not authorize punitive damages, nominal damages, or damages for emotional distress. See, *e.g.*, *Walker* v. *United Parcel Serv., Inc.*, 240 F.3d 1268, 1277-1278 (10th Cir. 2001); *Settle* v. *S.W. Rodgers, Co.*, 998 F. Supp. 657, 666 (E.D. Va. 1998), aff'd, 182 F.3d 909 (4th Cir. 1999) (Table); but see *Duty* v. *Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002) (allowing damages for emotional distress).

[38] Petitioners' insistence (Br. 36-37) that Section 5 legislation must include termination dates overlooks that Title VII contains no such provision. Petitioners' argument (Br. 36) that Section 5 legislation must have geographic restrictions ignores the fact that the existence of gender discrimination does not vary from region to region.

tasks particularly well suited for Congress. Furthermore, where state-sponsored gender or racial discrimination has infected the workplace for generations, determinations concerning the proper means to combat continuing stereotypes and assessments of what measures would restore a hypothetical status quo *ante*, where no discrimination occurred, see *Virginia*, 518 U.S. at 547, uniquely call for comprehensive legislative study, with nationwide input, and complex empirical and experiential judgments.

Accordingly, petitioners' argument (Br. 37) that Congress cannot create new "entitlements" under Section 5 is wide of the mark. Creating new prophylactic rules to address the lingering effects of past discrimination is a classic exercise of the Section 5 power. Congress has imposed functionally analogous remedial requirements on States as a means of enforcing Fourteenth Amendment rights in other contexts, such as through preclearance requirements for States' voting practices, *South Carolina* v. *Katzenbach*, *supra*. Title VII's disparate impact doctrine similarly can require adjustments of state employment policies and practices.[39]

Finally, Congress could conclude that enacting a neutral, across-the-board leave standard would relieve plaintiffs of the exceedingly difficult task of proving unconstitutional discrimination on a case-by-case basis. In the modern era, false and discriminatory stereotypes are rarely articulated in public. Proving that an invidious mindset animated a particular discretionary employment decision in an individual case likewise could prove to be beyond the capabilities and wherewithal of many employees, whose livelihood is in the

[39] Courts, likewise, have imposed affirmative requirements on States and localities as a means of remedying Fourteenth Amendment violations. See, *e.g.*, *Dickerson* v. *United States*, 530 U.S. 428 (2000). Congress, which the Constitution expressly charges with enforcing the Fourteenth Amendment, can have no narrower remedial power.

hands of their employer. This Court has upheld Section 5 legislation designed to eliminate such heavy burdens of proof.[40]

In sum, the FMLA's family leave provision is an "appropriate method" of remedying unconstitutional discrimination based on stereotypical assumptions spawned by generations of unconstitutional state conduct, and "of attacking the perpetuation of earlier, purposeful [gender] discrimination, regardless of whether the practices [it] prohibit[s] were discriminatory only in effect," *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980). The FMLA family-leave provision responds to a well-documented history of unconstitutional discrimination in employment and it does so in a narrowly targeted fashion, designed to put male and female employees in the place they would have been absent such discrimination. The FMLA thus promotes the "perfect equality of civil rights and the equal protection of the laws" that lies at the heart of Congress's Section 5 power. *Ex parte Virginia*, 100 U.S. at 345-346.

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[40] See *City of Rome*, 446 U.S. at 174; *South Carolina*, 383 U.S. at 328 ("Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting."); see also *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (summarily affirming constitutionality of Voting Rights Act Amendments of 1982).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

§ 2601. Findings and purposes

(a) Findings

Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early child-rearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purpose

It is the purpose of this Act—

(1) to balance the demands of the workplace with needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraph (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

§ 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In General

The term "eligible employee" means an employee who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include—

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in

subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer"—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

(6) Health care provider

The term "health care provider" means—

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

(9) Reduced leave schedule

The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary

The term "Secretary" means the Secretary of Labor.

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse

The term "spouse" means a husband or wife, as the case may be.

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that—

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued

paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section

is foreseeable based on planned medical treatment, the employee—

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by same employer

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken—

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

§ 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care pro-

vider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states—

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced

leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of

this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

§ 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been

provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if—

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than—

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by—

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

§ 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

§ 2616. Investigative Authority

(a) In general

To ensure compliance with the provisions of this subchapter, or any regulation or order issued under this subchapter, the Secretary shall have, subject to subsection (c) of this section, the investigative authority provided under section 211(a) of this title.

(b) Obligation to keep and preserve records

Any employer shall make, keep, and preserve records pertaining to compliance with this subchapter in accordance with section 211(c) of this title and in accordance with regulations issued by the Secretary.

(c) Required submissions generally limited to annual basis

The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this subchapter or any regulation or order issued pursuant to this subchapter, or is investigating a charge pursuant to section 2617(b) of this title.

(d) Subpoena powers

For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 209 of this title.

§ 2617. Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected—

(A) for damages equal to—

(i) the amount of—

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations

The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate—

(A) on the filing of a complaint by the Secretary in an action under subsection (d) of this section in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) of this section in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1),

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by Secretary

(1) Administrative action

The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title.

(2) Civil action

The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A) of this section.

(3) Sums recovered

Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to

each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation

(1) In general

Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation

In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement

In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary

The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary—

(1) to restrain violations of section 2615 of this title, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor

The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) General Accounting Office and Library of Congress

In the case of the General Accounting Office and the Library of Congress, the authority of the Secretary of Labor under this subchapter shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

§ 2618. Special rules concerning employees of local educational agencies

(a) Application

(1) In general

Except as otherwise provided in this section, the rights (including the rights under section 2614 of this title, which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this subchapter shall apply to—

(A) any "local educational agency" (as defined in section 7801 of Title 20) and an eligible employee of the agency; and

(B) any private elementary or secondary school and an eligible employee of the school.

(2) Definitions

For purposes of the application described in paragraph (1):

(A) Eligible employee

The term "eligible employee" means an eligible employee of an agency or school described in paragraph (1).

(B) Employer

The term "employer" means an agency or school described in paragraph (1).

(b) Leave does not violate certain other Federal laws

A local educational agency and a private elementary or secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 794 of this title or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this subchapter.

(c) Intermittent leave or leave on reduced schedule for instructional employees

(1) In general

Subject to paragraph (2), in any case in which an eligible employee employed principally in an instructional capacity by any such educational agency or school requests leave under subparagraph (C) or (D) of section 2612(a)(1) of this title that is foreseeable based on planned medical treatment and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either—

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that—

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) Application

The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an eligible employee who complies with section 2612(e)(2) of this title.

(d) Rules applicable to periods near conclusion of academic term

The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any eligible employee employed principally in an instructional capacity by any such educational agency or school:

(1) Leave more than 5 weeks prior to end of term

If the eligible employee begins leave under section 2612 of this title more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) Leave less than 5 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title

during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) Leave less than 3 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title during the period that commences 3 weeks prior to the end of the academic term and the duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) Restoration to equivalent employment position

For purposes of determinations under section 2614(a)(1)(B) of this title (relating to the restoration of an eligible employee to an equivalent position), in the case of a local educational agency or a private elementary or secondary school, such determination shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements.

(f) Reduction of amount of liability

If a local educational agency or a private elementary or secondary school that has violated this subchapter proves to the satisfaction of the court that the agency, school, or department had reasonable grounds for believing that the underlying act or omission was not a violation of this subchapter, such court may, in the discretion of the court,

reduce the amount of the liability provided for under section 2617(a)(1)(A) of this title to the amount and interest determined under clauses (i) and (ii), respectively, of such section.

§ 2619. Notice

(a) In general

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge.

(b) Penalty

Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.

§ 2631. Establishment

There is established a commission to be known as the Commission on Leave (referred to in this subchapter as the "Commission").

§ 2632. Duties

The Commission shall—

(1) conduct a comprehensive study of—

(A) existing and proposed mandatory and voluntary policies relating to family and temporary medical leave, including policies provided by employers not covered under this Act;

(B) the potential costs, benefits, and impact on productivity, job creation and business growth of such policies on employers and employees;

(C) possible differences in costs, benefits, and impact on productivity, job creation and business growth of such policies on employers based on business type and size;

(D) the impact of family and medical leave policies on the availability of employee benefits provided by employers, including employers not covered under this Act;

(E) alternate and equivalent State enforcement of subchapter I of this chapter with respect to employees described in section 2618(a) of this title;

(F) methods used by employers to reduce administrative costs of implementing family and medical leave policies;

(G) the ability of the employers to recover, under section 2614(c)(2) of this title, the premiums described in such section; and

(H) the impact on employers and employees of policies that provide temporary wage replacement during periods of family and medical leave.

(2) not later than 2 years after the date on which the Commission first meets, prepare and submit, to the appropriate Committees of Congress, a report concerning the subjects listed in paragraph (1).

§ 2633. Membership

(a) Composition

(1) Appointments

The Commission shall be composed of 12 voting members and 4 ex officio members to be appointed not later than 60 days after February 5, 1993, as follows:

(A) Senators

One Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate.

(B) Members of House of Representatives

One Member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one Member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives.

(C) Additional members

(i) Appointment

Two members each shall be appointed by—

(I) the Speaker of the House of Representatives;

(II) the Majority Leader of the Senate;

(III) the Minority Leader of the House of Representatives; and

(IV) the Minority Leader of the Senate.

(ii) Expertise

Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor management issues. Such members shall include representatives of employers, including employers from large businesses and from small businesses.

(2) Ex officio members

The Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Commerce, and the Administrator of the Small Business Administration

shall serve on the Commission as nonvoting ex officio members.

(b) Vacancies

Any vacancy on the Commission shall be filled in the manner in which the original appointment was made. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(c) Chairperson and vice chairperson

The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) Quorum

Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

§ 2634. Compensation

(a) Pay

Members of the Commission shall serve without compensation.

(b) Travel expenses

Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of Title 5 when performing duties of the Commission.

§ 2635. Powers

(a) Meetings

The Commission shall first meet not later than 30 days after the date on which all members are appointed, and the Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) Hearings and sessions

The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(c) Access to information

The Commission may secure directly from any Federal agency information necessary to enable it to carry out this subchapter, if the information may be disclosed under section 552 of Title 5. Subject to the previous sentence, on the request of the chairperson or vice chairperson of the Commission, the head of such agency shall furnish such information to the Commission.

(d) Use of facilities and services

Upon the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of such agency.

(e) Personnel from other agencies

On the request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to serve as an Executive Director of the Commission or assist the Commission in carrying out the duties of the Commission. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(f) Voluntary service

Notwithstanding section 1342 of Title 31, the chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

§ 2636. Termination

The Commission shall terminate 30 days after the date of the submission of the report of the Commission to Congress.

§ 2651. Effect on other laws

(a) Federal and State antidiscrimination laws

Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) State and local laws

Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

§ 2652. Effect on existing employment benefits

(a) More protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

§ 2653. Encouragement of more generous leave policies

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

§ 2654. Regulations

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

(15)

No. 01-1368

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS, ET AL.,
Respondents.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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93 pp

QUESTION PRESENTED

Whether the family-care provision of the FMLA, 29 U.S.C. § 2612(a)(1)(C), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of Congressional power to abrogate the States' sovereign immunity from suit by individuals.

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STATEMENT

The Family and Medical Leave Act of 1993 ("FMLA" or "Act") is directed at a leading source of unconstitutional sex discrimination today: the pervasive sex-role stereotype that caring for children and ill family members is women's work, a stereotype long embodied in hundreds of expressly sex-based state laws. It is difficult to think of a sex-based generalization that is more firmly and widely held than the assumption that a woman, because of her sex, will have greater responsibility than an otherwise similarly situated man for raising children and caring for family members when they are sick. The public record confirms that States often engaged in sex discrimination based on those convictions. Observation of the average tendencies of men and women has reinforced that sex-based over-generalization, but the tendencies of men and women to conform to "the role-typing [that] society has long imposed," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), cannot support States' use of sex as a proxy in decision making.

The FMLA is directly targeted at the fault line between work and family, precisely where sex-based overgeneralization has been and remains at its strongest. Consistent with this Court's equal protection jurisprudence, Congress in the FMLA addressed persistent and widespread problems of sex-based leave policies and practices and related forms of discrimination, as well as the lingering effects of broader historical state sex discrimination that has reinforced and perpetuated a sex-based division of family and workforce responsibilities. For the same reasons that this Court's modern equal protection doctrine has focused on preventing the official sorting of women and men into separate family and workplace spheres, barring that conduct is also at the heart of Congress's power under Section 5. The FMLA thus lies within Congress's authority to override state sovereign immunity and subject States to damages actions under the FMLA.

1. Background to the FMLA

Congress enacted the FMLA in the wake of a dramatic increase in workforce participation of women who were also primary caregivers at home for dependent or ill family members. Congress noted that the female civilian labor force more than doubled between 1950 and 1990. S. Rep. 103-3, at 5 (1993). By 1993, "74 percent of women aged 25-54 [were] in the labor force. Fifty-six percent of mothers with children under age six and 51 percent of mothers with children under age one [were] in the labor force." *Id.* at 6. At the same time, Congress noted, women retained their role as family caregivers. In addition to being primary caretakers for small children, women accounted for two-thirds of the non-professional care-givers to the elderly. *Id.* at 7. A 1990 study found that, due in part to lack of adequate family medical leave, 11 percent of family caregivers left the workforce to provide care. *Id.* at 7. Congress found further that the aging of the American population promised to intensify tensions between family needs and work demands, especially for women: "With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill." *Id.* at 7.

That acceleration of women's labor force participation occurred at a time when legal prohibitions against sex discrimination were well established, yet working women still faced entrenched obstacles to workplace advancement. A prominent study showed that women were no better off economically in 1983 than they were in 1959, "mainly because they hold the prime responsibility for children," and concluded that, as long as parental responsibility "is borne disproportionately by women, sex differences in the labor mar-

ket are likely to persist."[1] Of particular relevance, women faced a "glass ceiling" in state government: In 1990, women held only 31.3 percent of high-level state and local government jobs nationwide, while they comprised 43.5 percent of the balance of the public workforce. Associated Press, *Few Women Found in Top Public Jobs: Study Sees 'Glass Ceiling' at State and Local Agencies*, N.Y. TIMES, Jan. 3, 1992, at A12. State governments showed even poorer performance than local governments, and at cabinet levels women held only 19.8 percent of state jobs. *Id.*

While family responsibilities affected women's workplace advancement, the influx of women into the labor force also intensified pressures on families seeking to provide care for children or sick family members. Those pressures sharpened the need to prevent employers' decisions at the work-family juncture—whether as to men's family leave or the hiring and promotion of women—from being improperly corrupted by sex bias relating to family leave needs. Employers still adhered to double-edged stereotypes, ultimately harmful to men and women, including "assumptions that women should take primary responsibility for children and family matters, and that men have to work, while women have a choice." Debra B. Schwartz, *An Examination of the Impact of Family-Friendly Policies on the Glass Ceiling*, 36 (1994).[2]

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[1] *See The Parental and Medical Leave Act of 1986: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 99th Cong., 2d Sess. 61 (1986) (testimony regarding results of study by Stanford University Bureau of Economic Research).

[2] The American Bar Association testified in Congress that, "[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive assumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be. Current employment practices, because of sex discrimination against men, may in some cases, make it more difficult for men than for women to accommodate family responsi-

Congress determined that a federal guarantee of job-protected family leave available on a sex-neutral, nondiscretionary basis would help to counteract intractable forms of sex discrimination in employment.

2. The FMLA

In the introductory "Findings" and "Purposes" sections of the FMLA, Congress expressly invoked its power to enforce the Fourteenth Amendment. A central purpose of the Act was "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] clause [of the Fourteenth Amendment]." 29 U.S.C. § 2601(b)(5). Congress found that lack of a right to job-protected leave for employees who need to care for new children or sick family members can force individuals into conflicts between family and work. *Id.* § 2601(a)(2), (a)(3). Congress found that, "due to the nature of the roles of men and women in our society"—roles that state laws long supported—"the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." *Id.* § 2601(a)(5). Congress's findings emphasized the vital interest in assuring that "fathers *and* mothers" have an equal opportunity to participate in family care. *Id.* § 2601(a)(2) (emphasis added).

The FMLA remedies lingering effects of States' support for a sex-based division of labor between family and the paid workforce by making it more feasible for women to work and advance in their jobs and still respond to acute family-care needs, and for men to respond to such needs even when their employers would otherwise disapprove. The Act seeks "to balance the demands of the workplace with the needs of

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bilities without suffering adverse consequences." *The Family and Medical Leave Act of 1989: Hearing Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor*, 101st Cong., 1st Sess. 248 (1989) (statement of Clifford D. Stromberg, ABA).

families . . . in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . on a gender-neutral basis." *Id.* § 2601(b)(1)&(4). By extending a right to leave on a nondiscretionary, sex-neutral basis, the FMLA counters the double-edged discrimination arising from the assumption that women need more leave: bias against men in family leave, and against women in employment generally.

The FMLA entitles eligible employees to take up to 12 work weeks of unpaid, job-protected family leave per year in certain circumstances that place extraordinary demands on families: the birth, adoption or foster care placement of a child (*Id.* § 2612(a)(1)(A)&(B)), or the need to care for a spouse, child or parent with a serious health condition (*Id.* § 2612(a)(1)(C)). It also provides for medical leave for an employee's own serious health condition that renders him or her unable to perform the functions of the job (subsection (D)). *Id.* § 2612(a)(1). Upon return to work at the conclusion of FMLA leave, an employee must be reinstated to his or her former position or its equivalent. *Id.* § 2614(a). The FMLA also specifically prohibits retaliation against any individual for "opposing any practice made unlawful by this subchapter." *Id.* § 2615(a)(2); *see also* 29 C.F.R. § 825.220(e) ("Individuals . . . are protected from retaliation for opposing . . . any practice which they reasonably believe to be a violation of the Act or regulations.").

Congress clearly expressed its intent to abrogate states' sovereign immunity by defining covered "employers" to include "any public agency" as defined in the Fair Labor Standards Act. 29 U.S.C. § 2611(4). The Act authorizes a private right of action against any person who "interfere[s] with, restrain[s] or den[ies] the exercise of" FMLA rights. *Id.* § 2615(a)(1). FMLA remedies include equitable relief such as reinstatement, damages for lost pay and benefits *or* other actual monetary losses sustained (capped at an amount equal

to 12 weeks of wages or salary for the employee), interest, and fees and costs. 29 U.S.C. § 2617(a)(1)(A)(i)&(ii), (a)(1)(B), (a)(3). If an employer's conduct was in bad faith and was not based on a reasonable interpretation of the Act, the employer may also be liable for additional, liquidated damages in an amount equal to the total actual damages plus interest. *Id.* § 2617(a)(1)(A)(iii).

In the decade since the FMLA was enacted, experience has borne out Congress's hope that it would prove to be an effective and minimally burdensome response to persistent sex discrimination relating to the family-work balance. Studies show increased use of family leave by men, *see* Carol Kleiman, *More Are Using Family Leave Act, Especially Men*, CHICAGO TRIBUNE, Feb. 5, 2002, at 1, and the majority of employers find the FMLA easy to administer and not costly. *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* (2000 Update) at 6-9, 6-13. While the limited damages remedy is critical in deterring violations, damages awards under Section 2612(a)(1)(C) are both rare and modest, imposing negligible costs on employers.

3. Nevada's Violation of William Hibbs' FMLA Rights

William Hibbs was a social worker for the Welfare Division of the Nevada Department of Human Resources. In 1996, his wife, Dianne, suffered a severe neck injury in a car accident. Initial surgery left her by Spring of 1997 with severe pain and at grave physical and emotional risk: addiction to prescribed pain medications caused her to become clinically depressed and suicidal, necessitating at one point that she be admitted to a hospital psychiatric unit. She also had a metal plate in her neck from which the screws stripped and loosened, pressing against her esophagus and requiring her to be extremely careful in moving her body so as to avoid a fatal puncture. Her doctors recommended additional surgery,

and personal care by her husband in the interim. D. Ex. J, K, O, CC, DD.[3]

Hibbs obtained petitioners' approval for 12 weeks of unpaid FMLA leave to be taken as needed, and had used three weeks of it when he learned that he might be eligible for paid leave under Nevada's discretionary Catastrophic Leave (NCL) program.[4] He applied for and was awarded 9½ weeks of NCL leave. He preferred to take the paid NCL leave first and reserve the balance of his unpaid FMLA leave, so he started taking NCL leave as of August 11. He had enough approved NCL leave to last until October 20, after which he expected to use his remaining 9 weeks of unpaid FMLA leave to carry him through his wife's surgery, which was scheduled for November. P. Ex.1 (Hibbs Aff. ¶ 9);[5] D. Ex. D, N, O, T.

Hibbs was thus surprised to receive an October 10 letter informing him not only that his NCL leave would be exhausted in a few days, but that his "FMLA leave of 12 weeks ha[d] been fulfilled," and suggesting that he needed to apply for more NCL leave or return to work by October 20th. He immediately submitted new medical documentation and received the Welfare Division's approval on October 21 for five additional weeks of discretionary NCL leave. He also arranged to meet with petitioners to clear up the apparent

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[3] "D. Ex. __" refers to exhibits accompanying defendants' motion for summary judgment, which is included in their record excerpts on appeal at CR 55.

[4] Under that program, employees with accrued, unused annual or sick leave may donate it to other employees in specified circumstances, including an immediate family member's serious illness or accident. Nev. Rev. Stat. 284.362 to 284.3629. Qualifying employees may request up to a maximum of 26 weeks, or six months, of catastrophic leave in a calendar year. Nev. Rev. Stat. 284.3622.

[5] "P. Ex. __" refers to exhibits to plaintiff's motion for partial summary judgment, which appear at Tab D in plaintiff-appellant's excerpts of record on appeal.

confusion regarding his FMLA leave. Petitioners appeared to have counted his NCL leave against his 12-week FMLA entitlement, but they could not lawfully do so because they had failed to give him advance, individualized notice as the FMLA requires for any such offset.[6] At the meeting, on or about November 3, Hibbs asserted that petitioners were misreading the FMLA in concluding that his FMLA leave ran concurrently rather than consecutively with his NCL leave. Petitioners assured him that he would be given "ample notice of any decision taken by Nevada State Welfare." P. Ex. 1 (Hibbs Aff. ¶ 9, 12); D. Ex. X, CC, DD, AA.

Two days later, however, with no notice or other effort to work out a mutually acceptable arrangement with Hibbs, petitioners abruptly retracted their support of the renewed NCL leave he had just started to use, recalling the papers from the Director's Office where they were awaiting final sign-off. The following day, November 6, they delivered to Hibbs a letter threatening disciplinary action if he did not re-

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[6] The FMLA permits employers to require their employees to count "accrued paid vacation leave, personal leave, . . . family leave [or "medical" or "sick leave"] against the employee's FMLA leave allotment. 29 U.S.C. § 2612(d)(2)(A). An employer may only do so, however, if it gives the employee individualized, advance notice "within one or two business days [after notice of the need for leave is given] if feasible." 29 C.F.R. §§ 825.208(a), 825.301(c). The court of appeals erroneously stated that Hibbs "was informed that the [catastrophic leave] would 'be counted against [his] annual FMLA leave entitlement,'" Pet. App. 2a, when in fact the phrase the court quotes appears only on the form approving Hibbs' request for *unpaid FMLA leave* and makes the wholly unsurprising assertion that *that* leave would be counted against his annual FMLA leave entitlement. D. Ex. R. In any event, the court of appeals recited the facts only as background to its resolution of the Section 5 issue, and did not make any determination of absence of factual dispute regarding notice. Because the case comes here from denial of petitioners' motion for summary judgment, this Court should view the record, and draw all reasonable inferences from it, in Hibbs favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); Fed. R. Civ. P. 56(c), (e).

turn to work by November 12. Hibbs' efforts to discuss the situation further and to assert his right to unexpired FMLA leave met with a written reprimand citing his absence, and Director Firpo's response that she could not answer leave questions. On December 5, Firpo recommended Hibbs' dismissal for having been "absent without leave" since November 12, and the dismissal became effective on December 22, 1997. After a postponement while her husband prepared for and participated in a hearing relating to his dismissal, Dianne Hibbs underwent surgery in Arizona around the end of 1997.[7] D. Ex. AA, EE, FF, GG, HH; P. Ex. 1 (Hibbs Aff. ¶ 11). (A more detailed recitation of these facts appears in Respondent's Brief in Opposition to the Petition for Certiorari.)

4. Proceedings Below

On April 20, 1998, Hibbs filed suit in federal district court. Hibbs claimed that petitioners violated the FMLA by retaliating against him when he opposed their efforts to count his NCL leave against his FMLA leave, and by firing him while he was on approved, unexpired FMLA leave. Hibbs sought back pay, damages, declaratory and injunctive relief including reinstatement, interest, fees and costs, and all other appropriate relief. On petitioners' motion for summary judgment, the district court ruled from the bench that Hibbs'

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[7] Petitioners' statement that Hibbs received 12 weeks of FMLA leave "and over 500 hours [*i.e.*, 12½ weeks] of paid leave through Nevada's personal and family-care leave programs," Pet. Br. 14, misleadingly suggests that he received 24½ weeks of leave. In total, Hibbs received three weeks of unpaid FMLA leave and 9½ weeks of paid NCL leave, all of which Nevada pre-approved. Petitioners' figure double-counts his FMLA leave, assuming away the very issue in dispute by asserting that he was permitted to take all his FMLA leave. Their figure also apparently counts against him his three weeks of accrued annual and sick leave that he had earned and used before he even requested FMLA leave. Petitioners now point to Nevada's law permitting employees up to one year of leave without pay, *id.* at B-3 - B-4, as available for "care for a sick family member," *id.* at 6, but petitioners notably failed to afford any such leave to Hibbs when he urgently needed it for precisely that purpose.

FMLA claim was barred by the state's sovereign immunity. Pet. App. 47a-58a.

The United States intervened on appeal to defend the constitutionality of retrospective relief in private actions against state employers who violate 29 U.S.C. § 2612(a)(1)(C), and the court of appeals reversed the decision of the district court. The court unanimously held that Congress, in enacting the FMLA, had properly exercised its authority to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment in order to remedy and prevent unconstitutional sex discrimination. Pet. App. 12a-42a. The court reasoned that this Court's heightened standard of equal protection review of sex-based discrimination, which is itself based on a recognition of the pervasive character of sex-role stereotyping about work and family, justifies granting Congress greater leeway in identifying such problems for Section 5 purposes. Pet. App. 17a-19a. The court found that the legislative history showed "widespread *intentional* gender discrimination by states," whose "discriminatory leave policies are just the sort of difficult and intractable problem that justifies broad prophylactic measures in response." Pet. App. 21a (emphasis in original). Alternatively, the court found ample support for the FMLA's remedial character in that it was "designed to undo the impact of [a] history of state-supported and mandated sex discrimination as it continues to affect private and public employment." Pet. App. 23a.

The court of appeals concluded that the FMLA is a congruent and proportional response to States' unconstitutional sex discrimination because the Act "focuses on only one type of policy," family leave, the guarantee of which Congress concluded would be a "a modest step" toward counteracting sex discrimination by state and non-state employers alike. Pet. App. 36a. The court reasoned that a sex-neutral remedy is congruent and proportional because the discrimination affects both sexes. A sex-neutral solution both avoids unconstitutionally benefiting women alone based on over-broad generalizations that men do not also need family medical

leave, and blunts incentives to discriminate against women born of expectations that they will take more leave than men. *Id.* at 36a-40a.

SUMMARY OF ARGUMENT

One key objective of the FMLA is to remedy and deter unconstitutional sex discrimination in state employment. Recognizing that decisions about leave and employment often were tainted by stereotyped views about women's and men's proper roles in the family and workplace, and that explicitly sex-discriminatory state laws and practices had played a central role in reinforcing and perpetuating those stereotypes, Congress carefully crafted a remedy directed at the very intersection of work and family: family leave. As such, the FMLA lies at the heart of Congress's authority under Section 5 of the Fourteenth Amendment to remedy sex discrimination, and Congress properly exercised that authority to abrogate the states' immunity from damages actions.

Because the FMLA is directed at sex discrimination and specifically targets the very stereotypes about family and work that this Court has long recognized as a basis for its own heightened scrutiny of sex-based classifications, Congress should be granted substantial deference in regard to this exercise of Section 5 authority. This Court's Section 5 standards should therefore apply differently here than in cases involving classifications such as age or disability, which are subject only to rational basis review and thus presumptively constitutional. In particular, Congress should be permitted in exercising its Section 5 powers to rely on the same factual basis that this Court itself has relied on in interpreting Section 1 of the Fourteenth Amendment to require heightened scrutiny for all sex-based classifications—namely, the long history of discriminatory laws and policies in every State with respect to work and family roles, and the continuing stereotyped views of men's and women's proper roles that such discrimination fostered. Similar deference is appropriate in assessing Congress's chosen means to combat sex dis-

crimination, which the Court has itself recognized as subtle and enduring.

There is no basis for petitioners' belated effort to characterize the FMLA as an exclusive exercise of Commerce Clause authority (Pet. Br. 21-27). A section of the FMLA's statement of purposes that petitioners notably ignore expressly states that the Act was also based on Congress's power to enforce the Fourteenth Amendment. Indeed, the fact that Congress was exercising its Section 5 power to remedy sex discrimination was so plain that petitioners affirmatively conceded it below.

The FMLA is a remedy for and prophylactic against States' different treatment of men and women due to sex-based stereotypes about men's role as breadwinner, and women's role in tending to the family. The Act addresses three related forms of state discrimination: the continuing effects of States' past explicitly sex-based laws and practices, States' unconstitutionally granting women more family leave than men, and state employers' reluctance to employ women because they believed that women are more likely than men to take leave.

The FMLA responds to a form of sex discrimination that this Court has itself vividly described and resoundingly condemned in dozens of opinions over the last 30 years. Every State has a history of sex-based legislation reflecting and reinforcing the view that women are mothers first and workers second. The legislative record recounts the legacy of that discrimination for women in terms of depressed earnings and reduced opportunities in the absence of rights to family leave. Petitioners' effort to cast the results of a long and unfortunate pattern of state sex discrimination as nothing but a benign "social reality" (Pet. Br. 41) ignores volumes of history.

The record before Congress also reflected the States' continuing unconstitutional differential treatment of the sexes. As recently as 1987, almost twice as many women as men in state employment were offered parenting leave. Many state labor agreements and employment policies ex-

plicitly gave women, and not men, leave for child rearing. And when leave decisions were discretionary, they often invited resort to sex-role stereotypes. The record also shows that employers discriminated against women, especially women of child-bearing age, presuming them to be less attached than men to the workforce due to their family responsibilities. The seriousness and intractability of the discrimination identified in the legislative record and in "confirming judicial documentation" support Congress's decision to enact federal family leave legislation.

The FMLA is a congruent and proportional response to the discrimination Congress sought to address. The FMLA establishes a specific requirement that applies to only one narrow area of state employment policy—family and medical leave. Establishment of a minimum, non-discretionary threshold period of 12 weeks of unpaid leave remedies the disproportionate impact, rooted in a history of *de jure* discrimination, that lack of guaranteed leave imposes on women, and forestalls further discrimination. Casting the FMLA in sex-neutral and job-protected terms was critical to eroding the stereotyped link between women and family care, and thereby helping both to remedy leave discrimination against men and to alleviate *ex ante* employment discrimination against women.

Finally, the FMLA's damages provision is carefully limited, authorizing *either* actual damages (not to exceed an amount equal to 12 weeks of the employee's salary) *or* back pay, and liquidated damages doubling the compensatory amount only where the employer has acted in bad faith or without a reasonable basis. Because the FMLA rests on a sound basis and is drawn to avoid undue burdens on state and private employers alike, it is an appropriate exercise of Congress's Section 5 power.

In addition to his claim for leave, Hibbs has presented evidence of unconstitutional retaliation for the exercise of a federal right, in violation of due process and the First Amendment. On this basis alone, the Court has an independ-

ent ground for upholding the FMLA remedy for retaliation claims. Because state retaliation for exercise of a federally protected right is itself unconstitutional, it is appropriately the subject of an FMLA suit for damages against the States without regard to whether the FMLA also properly extends to conduct that is not itself unconstitutional.

ARGUMENT

I. SECTION 2612(a)(1)(C) IS APPROPRIATE SECTION 5 LEGISLATION.

A. Greater Judicial Deference Is Appropriate In Reviewing Congress' Enforcement Of The Fourteenth Amendment Against Forms Of Discrimination Subject To Elevated Scrutiny Than When Congress Acts Against Discrimination Subject Only To Rational-Basis Review.

Because the FMLA remedies unconstitutional sex discrimination at one of its most persistent focal points—the intersection of work and family—it lies in the core of Congress's Section 5 authority. The FMLA addresses the very sex-role stereotypes that this Court itself has pointed to as justification for heightened scrutiny of sex-based classifications. The Court accordingly should review with deference Congress's conclusion that there is a constitutional problem warranting legislation, and grant Congress sufficient leeway in prohibiting otherwise constitutional conduct as a means of enforcing the Equal Protection Clause. As this Court has emphasized, "[t]he appropriateness of remedial measures must be considered in light of the evil presented." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89 (2000).

The Reconstruction Amendments' enforcement clauses are distinctive among the Constitution's individual rights provisions in giving Congress enforcement authority coordinate with the authority of the courts. The clauses were framed with a recognition that the full force of the respective capabilities of both the judiciary and the Congress would be required to achieve equal protection. They thus harness

Congress's distinct and powerful abilities, including its capacities to find facts and fashion remedies, to assess overall patterns and risks of unconstitutional behavior, create remedies where there is reason to believe that case-by-case adjudication may be inadequate, and act prospectively. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 196 (1997) ("deference must be accorded to [Congress's] findings as to the harm to be avoided and to the remedial measures adopted to that end.").

In light of its recognition of racial discrimination as presumptively unconstitutional and an especially "[d]ifficult and intractable problem," *Kimel*, 528 U.S. at 88, the Court has accorded Congress more leeway in responding to it under Section 5 than it has with respect to classifications, such as age or disability, which this Court has treated as presumptively constitutional. The same deference should apply here because sex discrimination is also presumptively unconstitutional and a "difficult and intractable problem." *Id.* Thus, to affirm the validity of Congress's ends the Court need only "perceive a basis," *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966), for Congress to conclude that sex discrimination by States continues to affect employees at the intersection of job and family duties. *See Boerne*, 521 U.S. at 527 (approving *Morgan's* factual-basis holding) The Court also should review with deference Congress's chosen means of addressing the problem; it is for Congress "to assess and weigh the various conflicting considerations," *Morgan*, 384 U.S. at 653, and "to use any rational means to effectuate the constitutional prohibition" against sex discrimination. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

1. The Court should more readily perceive grounds for congressional efforts to respond to suspect-class discrimination.

This Court has relied on the history and continuing effect of sex-role stereotyping about work and family to justify interpreting Section 1 of the Fourteenth Amendment to require heightened scrutiny of sex-based classification where there is

reason to believe that case-by-case adjudication may be inadequate, *Virginia*, 518 U.S. at 531 ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."). In exercising its Section 5 power, Congress should likewise be permitted to take notice of that history and act in ways that are, in effect, the legislative counterpart to heightened scrutiny. When it does so, Congress helps to implement this Court's own equal protection standards so that we may more effectively remove continuing barriers to equality of the sexes, just as Congress's legislative response to racial discrimination has been critical in dismantling segregation and its legacy.

A half-century of state separate-spheres legislation has reinforced and calcified notions about men's and women's sex-appropriate work and family roles. Our nation's history of unjustified sex discrimination raises real concerns that government will continue to rely on unsupported notions about sex differences: "[A] traditional classification is more likely to be used without pausing to consider its justification . . . Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female . . ." *Mathews v. Lucas*, 427 U.S. 495, 520-521 (1976) (Stevens, J., dissenting). Such reflexive habits do not dissolve in the face of simple prohibitions against discrimination. Our current leadership generations came of age at a time when it was still "the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination." *Virginia*, 518 U.S. at 531, *quoting Goesaert v. Cleary*, 335 U.S. 464, 467 (1948). In light of the established history of ingrained state and private sex-role stereotyping about work and family roles that has demonstrably harmed both women and men, it is eminently appropriate for Congress, as it did in the FMLA, to legislate in favor of official sex neutrality and individual choice on matters of work and family.

In reviewing Section 5 legislation addressed to racial discrimination, the Court has said that "Congress may avail itself of information from *any probative source.*" *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966) (emphasis added). The same should be true for legislation designed to remedy sex discrimination. Here, it is appropriate to consider not only the legislative record of the FMLA itself, but also Congress's prior legislative enactments, decisions of this and other courts (of which Congress is presumed to be aware, *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978)), census data, reports by executive branch agencies and others, generally available studies and analyses, as well as illustrative state laws, policies, and labor agreements. No one could seriously dispute that the constitutional problem Congress sought to address in the FMLA was widespread among state and private employers alike.

At the same time, it is precisely *because* there are "volumes of history" establishing the existence and evils of sex-based discrimination that sex-based classifications are subject to skeptical scrutiny in the first place, *Virginia*, 518 U.S. at 531, and Congress need not revisit that history in exhaustive detail in the legislative record before legislating to remedy it. Even though the Court gives special weight to material that Congress has affirmatively identified in findings and record, *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-372 (2001); *Kimel*, 528 U.S. at 90-91; *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Fund*, 527 U.S. 627, 640 (1999), there is no requirement that there be a detailed legislative record, *Kimel*, 528 U.S. at 91 (lack of a showing in the ADEA's legislative history of any widespread pattern of unconstitutional state conduct was "not determinative of the Section 5 inquiry."). As this Court has consistently recognized, "judicial deference, in most cases, is based not on the state of the legislative record Congress compiles, but 'on due regard for the decision of the body constitutionally appointed to decide.'" *Boerne*, 521 U.S. at 531. Rather, a congressional record may be useful where the unconstitu-

tional state conduct at which a federal law aims is not readily "visible to the naked eye." *Cf. United States v. Morrison*, 529 U.S. 598, 612 (2000) (formal findings are not required to support commerce clause legislation, but "the existence of such findings may enable us to evaluate the legislative judgment that the activity in question substantially affects interstate commerce even though no such substantial effect is visible to the naked eye."); *United States v. Lopez*, 514 U.S. 549, 562 (1995). Here, however, the problem was plainly visible to all who studied workplace inequality.

The suspect quality of sex as a basis for state action makes appropriate here a different approach to the legislative record than the one employed in *Garrett* and *Kimel*. The Court in those cases found inadequate factual predicates when judged "against the backdrop of [its] equal protection jurisprudence," which applies rational basis review and therefore generally *permits* reliance on age or disability except where wholly irrational. *Kimel*, 528 U.S. at 86; *see Garrett*, 531 U.S. at 366-367. The Court noted that Congress had responded to what appeared to be merely a tendency of officials to make age- or disability-based distinctions—conduct that is presumptively lawful. As the Court explained in *Kimel*, States can draw lines based on age "when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." 528 U.S. at 85-86. Thus, in order to impugn the constitutionality of state conduct with respect to non-suspect classes such as the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a "widespread pattern" of *irrational* reliance on such criteria. *Id.* at 90.

As demonstrated below, Point I.D., there is no question that workplace bias based on stereotypes about men's and women's family roles—the discrimination that the FMLA seeks to remedy and prevent—is both widespread and unconstitutional. This Court's heightened scrutiny itself rests on that conclusion. Accordingly, the Court need only "perceive

a basis" for the FMLA to satisfy the first prong of the Section 5 inquiry.

2. The Court should more readily sustain Congress's choices of powerful remedies where legislation responds to difficult and intractable problems subject to elevated judicial scrutiny.

The fact that the FMLA seeks to remedy sex discrimination should also affect the Court's review of the means Congress has chosen. The congruence and proportionality analysis that this Court has developed in recent cases addressing classifications subject only to rational basis review should be applied with sensitivity to the need for "powerful remedies" for intractable problems like the sex discrimination at issue here. *Kimel*, 528 U.S. at 88-89 ("Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.").

States' subtle and entrenched reliance on over-broad sex-based generalizations has proved especially resistant to judicial and legislative efforts to achieve sex equality with simple prohibitions against discrimination. In such circumstances, Congress has enhanced power to fill the gap by addressing under-enforcement in ways that the courts are not able to do. *See South Carolina*, 383 U.S. at 328 (finding Section 5 legislation appropriate where "case-by-case litigation was inadequate to combat widespread and persistent discrimination"); *Boerne*, 521 U.S. at 526 (accord). In particular, where patterns of sex-based decision making are likely to fall through the cracks of judicial sanction, Congress may—as it did in the FMLA—use its Section 5 authority to fashion an affirmative remedy that goes beyond a bare prohibition against sex discrimination. *See South Carolina*, 383 U.S. at 334 (approving required pre-clearance of voting changes as remedy for racial discrimination). This Court has made clear that in addressing state determination subject to heightened levels of review, Congress may use "any rational means," *Oregon v. Mitchell*, 400 U.S. 112,175 (1970), and that it is for Congress

to assess and weigh the various conflicting [remedial] considerations." *Morgan*, 384 U.S. at 653 This Court should therefore review with deference Congress's choice to afford a right to a minimum period of nondiscretionary, job-protected leave as a remedy for the sex discrimination it targeted.

In disputing the notion that this Court's elevated scrutiny of sex discrimination properly informs Section 5 analysis, petitioners cite *United States v. Morrison*, 529 U.S. 598, 620-626 (2000), and *City of Boerne v. Flores*, 521 U.S. 507 (1997). Pet. Br. 42-44. But the decisive flaw in the Violence Against Women Act (VAWA) at issue in *Morrison* was that the Fourteenth Amendment prohibits only state discrimination, whereas VAWA created a private right of action authorizing suit against private individuals. VAWA thus lacked congruence with the asserted equal protection right. *Id.* at 626. And the very point of *Boerne* was that failure to accommodate religion is *not* ordinarily subject to elevated constitutional scrutiny under this Court's free exercise jurisprudence, so that opinion can hardly be viewed as guidance regarding the enforcement of rights triggering heightened judicial scrutiny.

B. Congress Clearly Sought To Exercise Its Power Under The Fourteenth Amendment Enforcement Clause.

Although this Court has never required as much, Congress explicitly invoked its Fourteenth Amendment power to remedy sex discrimination as a basis for the FMLA, announcing the Act's purpose "to promote the goal of equal employment opportunity for women and men, *pursuant to* [the Equal Protection] clause." 29 U.S.C. § 2601(b)(5) (emphasis added). From the start of the federal legislative process in 1984 to the 1993 session when Congress adopted the version signed into law, the congressional committees repeatedly invoked "not only Congress' power to regulate commerce under the Commerce Clause, but also its power to enforce the guarantees to equal protection and due process of the laws embodied in the Fourteenth Amendment." H.R.

Rep. 100-511, pt. 2, at 26-27 (1988).[8] All that is required is that the Court can "discern some legislative purpose *or factual predicate* that supports the exercise of Fourteenth Amendment power." *EEOC v. Wyoming*, 460 U.S. 226, 244 n. 18 (1982) (emphasis added); *see* Pet. Br. 26 (quoting same). Here, the record is so clear that Nevada expressly conceded below that the FMLA is properly regarded as Section 5 legislation, and stated that the only dispute is "whether the means adopted by Congress in the FMLA are congruent and proportional to the goal of preventing gender discrimination in this context." *See* Def-Appellee's Ans. Br. at 24-27 (11/15/99); Supp. Br. in Resp. to Br. of Interven. United States at 7 (4/16/01) ("Congress operated under the premise that the evil to be remedied was pervasive gender discrimination in the work place").

Petitioners' new insistence that the FMLA is grounded solely on Congress's commerce power, and that Congress invoked the Fourteenth Amendment only to explain the sex-neutral form of the legislation, *see* Pet. Br. at 21-27, is contradicted by the above record and rests on the false premise that a workplace law supported by the Commerce Clause cannot also be an anti-discrimination measure pursuant to Section 5. Petitioners are correct that Congress's invocation of the Equal Protection Clause in *one* of the FMLA's findings was intended to support the adoption of a sex-neutral remedy, 29 U.S.C. § 2601(b)(4); however, petitioners fail to mention that Congress again invoked the Clause in a *separate* finding to describe the substantive goal the Act was intended to achieve. 29 U.S.C. § 2601(b)(5). Nor do Petitioners' snippets of legislative history prove their point: The term "labor standard" was used in FMLA hearings as a

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[8] *See, e.g.*, S. Rep. 103-3, at 16 (1993) ("S.5 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment."); S. Rep. 102-68, at 25 (1991) (same); H.R. Rep. 101-28, pt. 1, at 14-15 (1989) (same).

shorthand for a uniformly applicable, sex-neutral provision, and nothing about that term or Congress's concern for men's as well as women's leave needs detracts from the FMLA's character as legislation counteracting sex discrimination.[9]

C. The FMLA Responds To Unconstitutional Sex Discrimination As This Court Defines It.

The FMLA is addressed to a paradigmatic form of sex discrimination. This Court's equal protection jurisprudence is designed to bar state reliance on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas,'" *Craig v. Boren*, 429 U.S. 190, 198-199 (1976), and to uproot the correlative sex bias against men when they are presumptively cast as family "breadwinners." *Frontiero v. Richardson*, 411 U.S. 677, 681 (1973). In recognition of the pervasive part that sex-role stereotypes, particularly those about work and family roles, have played in maintaining inequality between men and women, this Court skeptically scrutinizes discrimination not just against females, but against males as well. *Hogan*, 458 U.S. at 723-724; *Craig v. Boren*, 429 U.S. at 201; *see also Nguyen v. INS*, 533 U.S. 53, 92 (2001) (O'Connor, J., dissenting) (noting that to indulge "the stereotypical notion that mothers must care for the[ir] children and fathers may ignore them, quietly condones the 'very stereotype the law condemns.'"). When States treat female and male employees differently due to sex-based assumptions about their family responsibilities, they violate the Equal Protection Clause as this Court has interpreted it. This Court skeptically scrutinizes and presumptively rejects any state decision based on sex, *see generally United States v. Virginia*, 518 U.S. 515, 533 (1996), even when the State intends no disrespect of women, *see Hogan*, 458 U.S. at 725; and even where the generalization may be factually supported, *see Virginia*, 518 U.S. at 542.

[9] *See, e.g., The Family and Medical Leave Act of 1987: Joint Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 100th Cong., 1st Sess. 64, 66 (1987) (statement of Eleanor Smeal, President, National Organization of Women describing legislation as "an affirmative program to make sure that women workers are not discriminated against" and also as "a labor standard").

The FMLA targets at least three forms of unconstitutional sex discrimination (evidence of which is discussed in more detail below, *infra* Point ID). First, it targets the current effects of past sex-based state laws that limited women's workforce participation based on a "separate spheres" ideology. These effects include pervasive and intractable stereotypes that reinforce a sex-based division of home and work responsibilities that Congress expressly found still stands today as an obstacle to women's equal workforce participation. 29 U.S.C. § 2601(a)(5). States' failure to provide job-protected, nondiscretionary family leave thus disproportionately harmed women. While disparate impact alone is not a constitutional violation, where such impact flows from past, unconstitutional state conduct, Congress has Section 5 power to remedy it. *See Lopez v. Monterey County*, 525 U.S. 266, 283 (1999); *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); *City of Rome v. United States*, 446 U.S. 156, 176 (1980).

Second, the FMLA targets States' practices, in some cases very recent, of offering women more family leave than men. Sometimes the disparity is codified, such as where "maternity" leave exceeds pregnancy disability and thus amounts to women-only parental leave. Sometimes the disparity arises in the way employers exercise their discretion to treat similarly situated women and men differently due to over-broad assumptions that women are primary family caregivers. As discussed below, Point I.D., the FMLA's legislative history documents significant, sex-based differentials in family leaves offered by state and private employers alike.

Third, the FMLA addresses the continuing problem of States' discrimination against women in hiring and promo-

tion because of sex-based stereotypes that a woman is likely to be less committed to the workforce than a similarly qualified man. Congress was aware of cases from the 1980s and 1990s showing that States, like other public and private employers, discriminated against women because of beliefs "that a woman should stay at home with her family." *Moore v. Alabama State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala. 1997); *see generally cases cited infra note* 23.

Each of these forms of discrimination is plainly unconstitutional under this Court's definition of the equal protection right, and therefore Section 5 authorizes Congress to provide an appropriate remedy.

D. The Ample Record Of Unconstitutional Sex Discrimination By The States And The Risk Of Future Discrimination Confirms The Basis For The FMLA.

The trigger for the FMLA was a surge in the workforce participation of *women* and the increased problems of sex discrimination that accompanied that development.[10] Con-

[10] *See supra* at 2; *see, e.g.*, S. Rep. 103-3 at 5-6; H.R. Rep. 103-8, pt. 1 at 16-17; H.R. Rep. 103-8, pt. 2 at 10-11; S. Rep. 102-68, at 25-26. *See supra* at 2. S. Rep. 103-3 at 7 ("The effect of these demographic changes has been far reaching. With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill"); H.R. Rep. 103-8, pt. 2 at 25 (citing Norton testimony, *Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Civil Service of the Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 31 (1987) ("The disarray in much of family life in the United States today has proceeded from the economy's demand that women work, coupled with society's failure to accommodate its institutions to this economic reality."); *id.* at 17 (the "explosion in the number of elderly coupled with the dramatic influx of women—the traditional family caregiver[s]—into the workforce has made 'eldercare' a critical work issue . . . 2.2 million people, predominantly women, cared for 1.2 million frail elderly people in 1982 . . . And this, of course, is in addition to the more familiar figures for mothers with children who are young."); S. Rep. 102-68, 25-26 ("The once-typical

gress believed that a sex-neutral, job-protected family-leave right was needed to enable families to depart from the traditional, state-reinforced model of a mother with primary responsibility at home and a father with primary responsibility at work.[11] The FMLA is designed to meet family-care *and* workplace gender-equity objectives by guaranteeing that "[a] father, as well as a mother, can take family leave because of the birth or serious health condition of his child; a son as well as a daughter is eligible for leave to care for a parent," and by "permit[ting] families to choose which parent or sibling will attend to extraordinary family responsibilities in light of the

American family, where the father worked for pay and the mother stayed home with the children, is vanishing."); *The Parental and Medical Leave Act of 1987, Hearings Before the Subcomm. of the Senate Comm. on Labor and Human Resources, Part 2*, 100th Cong., 1st Sess. [hereinafter "1987 Senate Labor Hearing"] at 29-30 (1987) (testimony of state legislator that State had "predicated a lot of our ideas and a lot of our policies based on the myth that somehow or other this is what the family looks like," *i.e.*, "[t]he man is working and the woman is staying home taking care of the kids."); *Family and Medical Leave Act of 1987: Joint Hearing Before the House Committee on Post Office and Civil Service*, 100th Cong., 1st Sess. 31 (1987) [hereinafter "1987 Post Office Hearing"] ("Because working women continue to bear disproportionate responsibility for the nuts and bolts of family life, H.R. 925 may be viewed as feminist legislation"); *Parental and Disability Leave: Joint Hearing Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess. 10 (1985) (statement of Wendy W. Williams, Assoc. Professor, Georgetown Univ. School of Law) (The FMLA "speaks tellingly to that crucial intersection between job and home where family needs clash with the demands of a work world which relies as never before on female labor but whose personnel policies are more suited to a male work force with wives performing the traditional and necessary functions in the home.").

[11] Both types of family leave provided in the FMLA—including parenting leave (subsections 2612(a)(1)(A) and (B)) and family medical leave (subsection 2612(a)(1)(C)) respond to the same stereotype about women's family role, so evidence showing that states acted on that stereotype provides common support for all three subsections.

family's preferences, needs, career concerns, and economic considerations." S. Rep. 103-3 at 24. Congress had an ample record upon which to base that conclusion.

1. Continuing effects of the States' past, overt sex discrimination.

Section 5 empowers Congress to remedy current effects of past unconstitutional conduct by the States. *See supra* at 23. The FMLA targets the intersection of work and family as a means of redressing the lingering harmful effects of state-mandated, entrenched sex roles. Congress found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5). The Senate Committee noted that, "[i]n the absence of a family leave standard, childbirth and the need to care for a sick child or parent have an adverse impact on women's earnings." S. Rep. 102-68 at 28. The Committee reported that, "by the year after birth, the earnings of mothers were $1.40 lower [per hour] than those of women who did not give birth (although they had been higher before birth)," and "the cost of elder care is estimated at $4.8 billion annually in lost income (mostly to women)." *Id.*

A half century of state laws overtly discriminating on the basis of sex in employment played a central role in cementing the sex-based division of labor in the workplace to which Congress's finding refers. *See* Pet. App. 24a-30a; *see Brief of Amici Curiae Women's History Scholars Alice Kessler-Harris, Linda Kerber, et al.* at Point III (recounting legal history of state sex discrimination). Countless historical and legal sources, including many opinions of this Court, confirm the ubiquity of state action reinforcing a view of women as peripheral to the workforce due to their primary responsibilities for family care. *See, e.g.*, Steven K. Wisensale, *Family Leave Policy, The Political Economy of Work and Family in America*, at 100-114 (2001); Helen Tierney, *Women's Studies Encyclopedia*, at 1156-1158 (1999); Edith L. Fisch &

Mortimer D. Schwartz, *State Laws on the Employment of Women* (1953) (state-by-state survey of laws including hundreds of sex-based "protective" laws). Relevant sex-based laws hindering women's workplace equality often included leave laws that cast women as family care takers. *See infra*, Point I.D.2.a. Petitioners' suggestion that the sex-based differential in family caretaking roles that Congress referred to in 2601(a)(5) was simply an abstract "social reality" and not a "result of unconstitutional discrimination" by States, Pet. Br. at 41, is thus belied by reams of public records.

Sex-based state laws prohibiting women from working in many fields, limiting their hours, and making them less desirable employees through special protections requiring minimum wages and special amenities for women only prompted households to organize themselves so that men worked and women remained at home. That legislation hindered generations of women from demonstrating that they could compete in the paid workforce on equal footing with men. At the same time, it constrained working men from taking an equal share of responsibility for the care of dependent family members.

Even as many expressly sex-based state laws were invalidated or repealed, the enduring stereotypes sustained by state laws mean that women continued to shoulder primary responsibility for family care. Yet before Congress began to consider federal family leave legislation, virtually no States had family leave laws; and when the FMLA was enacted in 1993, many States still failed to grant any right to family leave. The absence of family leave coupled with the continuing effects of past discrimination, imposed substantial burdens on women as a class.

As Congress observed, "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women." H.R. Rep. 103-8, pt. 1, at 24 (1993); S. Rep. 103-3, at 7. When one member of a dual wage earner couple has to care for a sick child, 83 percent of employed mothers say they are more likely than their part-

ners to take time off. Families & Work Institute Study (1997). Past discrimination also left women with lower pay, less job security, shorter job tenure, and fewer accumulated benefits such as sick leave or vacation days, and therefore more vulnerable in the absence of family leave rights. *See Califano*, 430 U.S. at 318. Just as this Court has repeatedly approved Congress's efforts to prevent facially neutral policies from "freez[ing] the effect" of past unconstitutional racial discrimination, *South Carolina v. Katzenbach*, 383 U.S. at 334; *City of Rome v. United States*, 446 U.S. 156, 176 (1980), it should approve the FMLA as an effort to remedy the continuing effects of past sex discrimination.

2. States' continuing disparate treatment of women and men.

The FMLA also responded to continuing forms of sex discrimination. State employers, just like all employers, still relied on overbroad sex-based generalizations about the tendencies and capacities of women and men. States discriminated against men by granting more leave to women than to men, and against women by assuming that, where work-family conflicts arise, women were more likely than men to leave the job.

At the time the FMLA was under consideration, employers and the general public expressed overwhelmingly greater support for family leaves—and particularly for longer leaves—for mothers than for fathers, reflecting the still widely held belief that family care is women's responsibility.[12] And employers reacted negatively when a father

[12] *See, e.g.*, Opinion Roundup, PUBLIC OPINION, May/June 1987, at 37 (18% of people surveyed thought employers should be required to provide parental leave to women employees to care for newborns compared to 3% who thought employers should be required to provide it for men); Catalyst, Report on a National Study of Parental Leaves (1986) (cited in S. Rep. 103-3 at 15) (63% of employers thought men should take no unpaid parental leave, whereas only 20% thought women should take none).

planned to take any time off.[13] These stereotypes led States both to maintain overt sex discrimination in their laws and policies, and rely on covert sex-based considerations in discretionary employment decisions.

a. Overtly sex-based family leave laws and policies.

When Congress took up consideration of the FMLA, many States still had overtly sex-based family leave laws, policies and practices. The Bureau of Labor Statistics (BLS) reported that in 1987, 57 percent of female state employees were offered maternity leave whereas only 30 percent of male employees could take paternity leave. Department of Labor, Bureau of Labor Statistics, Employee Benefits Survey, from http://data.bls.gov query on leave.[14] The figures for 1990 were 51 percent versus 33 percent, and for 1992, 59 percent versus 44 percent. *Id.* Congress was well aware of BLS studies; indeed it cited a parallel set of results for the private sector. *See* S. Rep. No. 103-3, at 14-15 (citing BLS

[13] Catalyst, 65-66. *1987 Senate Labor Hearing*, at 287 (witness representing National Federation of Independent Businesses testified that "we certainly recognize that our ladies need the time but when we talk about a man taking leave because there is a new baby in the household, I cannot accept that from an employer's point of view."); *see* Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, at 24 ("men are reluctant to take leave for family reasons because of the detrimental effect on their careers."). States employ these sex biases not only in employment contexts, but in family law as well, where state judges, for example, express the same stereotypes regarding the inappropriateness of "too much" paternal involvement in child rearing. *See, e.g.*, Maryland Special Joint Committee, Gender Bias in the Courts, at 26 (1989).

[14] The BLS figures refer to "nondisability maternity leave or paternity leave," and thus do *not* include pregnancy or childbirth-related disability leave. Joseph R. Meisenheimer II, *Employer Provisions for Parental Leave, Monthly Labor Review*, at 22 (Oct. 1989). Meisenheimer's article discusses private employer data in response to our inquiry; the BLS confirmed by e-mail that the cited figures regarding States also excluded pregnancy or childbirth-related disability leave.

figures that in 1990, 37 percent of employees were covered by maternity policies, while only 18 percent were covered by paternity policies). Congress was also aware that a 50-state survey had established that "public sector leaves don't vary very much from private sector leaves."[15]

Many States offered extended "maternity" leave that greatly exceeded the typical 4-8 week period of physical disability due to pregnancy and childbirth,[16] while granting no paternity leave at all. Longer leaves for women that are not attributable to differential physical needs presumptively violate equal protection, *Virginia*, 518 U.S. at 534. Fifteen States provided women up to one year of extended maternity leave, while only four States provided men a parallel benefit. Eleven States provided women up to six months of extended maternity leave, but only seven States gave men up to six months for paternity leave. Michelle Lord & Margaret King, *The State Reference Guide to Work-Family Programs for State Employees* (1991), 30. In addition, state leave laws often specified that catch-all leave-without-pay-provisions could be used for extended maternity leave, but did not authorize such leave for paternity purposes.[17]

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[15] 1986 House Joint Hearing, at 29-30 (testimony of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project); Kathleen Makuen, *Public Servants, Private Parents: Parental Leave Policies in the Public Sector, In The Parental Leave Crisis: Toward a National Policy* (Edward F. Zigler & Meryl Frank, eds., 1998), 202-03; 1986 House Joint Hearing, at 147 (Washington Council of Lawyers) ("Parental leave for fathers or adoptive parents is rare. . . Even where child-care leave policies do exist, men, both in the public and in private sectors, receive notoriously discriminatory treatment in their requests for such leave).

[16] *See, e.g.*, S. Rep. 103-3 at 16 (six weeks is the medically recommended pregnancy disability leave period); H.R. Rep. 101-28 at 30 (referring to PDA legislative history establishing 4 to 8 weeks as the medical recovery period for a normal childbirth).

[17] *See, e.g., 1987 Post Office Hearing*, at 2-5 (Rep. Gary Ackerman recounted suffering expressly sex-based denial of unpaid leave of absence where benefit was ostensibly available for "child care leave").

Congress was also aware that state employers' collective bargaining agreements often granted extended "maternity" leave of six months to a year, which also amounted to presumptively unconstitutional women-only parenting leave. Gerald McEntee, President of the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), testified that "the vast majority of our contracts, even though we look on them with great pride, really cover essentially maternity leave, and not paternity leave." *1987 Senate Labor Hearings*, at 385.[18] Personnel policies of state colleges and universities also reveal a pattern of explicitly sex-based distinctions in parenting leave.[19] Some laws and

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[18] *See, e.g.*, Master Contract Between the State of Rhode Island and AFSCME (1992-1995) (maternity leave without pay "shall be granted for a period of not less than three months nor more than 12 months and may be extended by mutual consent"); 1991-1993 Collective Bargaining Agreement Between State of Iowa and AFSCME (Blue Collar, Clerical, Community Corrections, Professional Fiscal & Staff, Security Technical) (providing for maternity leave of up to one year, medical excuse needed after six months); Agreement Between State of Iowa and AFSCME, Clerical Unit Collective Bargaining Agreement (7/1/85-6/30/87) (Iowa) (same); Agreement Between Development Corporation for Israel (NY) and Community and Social Agency Employees Union (1/1/91-12/31/93) (providing for one year maternity leave); Contract Between the State of Ohio and Ohio Civil Service Employees Assn. (1989-1991) (pregnant employees entitled to unpaid leave for "up to six months after all other paid leave has been used"); Agreement Between the Executive Department of the State of Oregon and AFSCME (1983-1987) (providing maternity leave for "a reasonable period of time not to exceed six months"); Agreement Between University of Minnesota and AFSCME (7/1/83-7/1/85) (providing for up to one year of maternity leave, but only three months of paternity leave); Master Agreement Between Commonwealth of Pennsylvania and Council 13, AFSCME (7/1/83-6/30/85) (providing for up to one year of maternity leave). These collective bargaining agreement provisions are lodged with the Court.

[19] *See, e.g.*, University of Colorado Faculty Handbook, eff. 9/88 ("on request, female members of the faculty will be given maternity leave without pay for a period not to exceed two consecutive semesters."); Kentucky State University 11/1/88 (allows use of sick leave and leave with-

policies even *required* women to take specified periods of time off for maternity purposes, unrelated to the mother's actual maternity disability.[20]

b. Discretionary leave policies and risk of discriminatory application

Congress had evidence that even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. Before the FMLA, if States granted

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out pay for maternity leave, with no provision for paternity leave); Auburn [Alabama] University Faculty Handbook 1969-70 (maternity leave without pay for up to six months); Westark [Arkansas] Community College Personnel Policy, eff. 9/1/69) (maternity leave of up to a year). The cited policies are lodged with the Court. *See also Danielson v. Board of Higher Education*, 358 F. Supp. 22 (S.D.N.Y. 1972) (state college denied one-year leave to male faculty member planning to stay home and assume the primary responsibility for the care of his infant child, while policy made such leave available to women).

[20] Alabama (Auburn University Faculty Handbook 1969-70) ("[e]xpectant mothers . . . are expected to stop working at least two months prior to the anticipated delivery date and not to return to work for at least a six weeks period following the baby's arrival"); California (Orange Coast College personnel policy 8.36, eff. 1/1/73) ("Employees are encouraged to begin their maternity leave two months prior to the expected date of birth," and may continue to work beyond that point only "upon the recommendation of a licensed California physician."). Utah disqualified women for unemployment compensation for an 18-month period immediately preceding and following childbirth. *See Turner v. Department of Employment Sec. of Utah*, 423 U.S. 44, 45 (1975) (invalidating provision of Utah's unemployment compensation law that "establishes a blanket disqualification during an 18-week period immediately preceding and following childbirth"), *see Schattlman v. Texas Employment Commission*, 459 F. 2d 32 (1972) (sustaining state employer's policy of mandatory resignation of pregnant employees by seventh month of pregnancy). Other state policies similarly reflected overbroad, sex-based generalizations about women's family care role, such as those granting one day to fathers for birth of their own child and providing men no other parenting leave reflected official expectations that men typically would play a minor, even nominal, role in parenting. *See, e.g.*, California (Orange Coast College) personnel policy 8.33, eff. 1975-1976).

family leave at all (*see Brief of Amici Curiae Women's History Scholars Alice Kessler-Harris, Linda Kerber, et al.* Appendix), they ordinarily granted it only on a discretionary, case-by-case basis. Many current state laws continue to grant family medical leave only on a discretionary basis.[21]

Congress was aware that employers making case-by-case leave decisions often acted on sex-based assumptions about the need for leave, the likelihood that the employee could arrange for someone else to provide the care, and the employee's future loyalty to the workforce. Leave policies that permit state employers *discretion* in whether to grant leave, increase the risk of unconstitutional sex-based discrimination, even if the policies may be gender-neutral on their face. Moreover, *ad hoc* practices that do not guarantee sex-neutral leave are also more likely to deter male employees from requesting leave for fear that such a request will undermine their position at work. *Cf. Teamsters v. United States*, 431 U.S. 324, 365-366 (1977).

Congress was well aware that *ad hoc* exercises of employer discretion invited unequal administration. The House Report noted "serious problems with the discretionary nature of family leave," because when "the authority to grant leave and to arrange the length of leave . . . rests with individual supervisors," it leaves "employees open to discretionary and possibly unequal treatment." H.R. Rep. 103-8, pt. 2, at 11. Testimony supported that conclusion, explaining that "[t]he lack of uniform parental and medical leave policies in the work place has created an environment where [sex] discrimi-

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[21] *See, e.g. infra*, App. (identifying 14 state flexible sick leave laws that expressly subject use of sick leave for family care purposes to employer discretion); *see generally* Michelle Lord & Margaret King, *The State Reference Guide to Work-Family Programs for State Employees* (1991), 33 (finding that "[b]y leaving the language vague, the actual interpretation and decision-making responsibility for allowing the use of sick leave in family situations lies with the immediate supervisor or other appointing authority.").

nation is rampant." *1987 Senate Labor Hearing*, at 170 (Testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago).

Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001) vividly illustrates that this problem continues. Although a Maryland statute authorizes employees to use sick leave for purposes of nurturing a new child in sex-neutral terms, state officials denied primary care-giver leave to Maryland State Trooper Harold Knussman following his child's birth and when his wife was very ill. The State's manager of medical leave and benefits told Knussman that "God made women to have babies and, unless he could have a baby, there is no way [he] could be primary care [giver]" eligible for the full amount of child care leave, and that his wife would have had to be "in a coma or dead" for Knussman himself to qualify as primary. *Id.* As *Knussman* dramatically demonstrates, family leave policies that grant employers broad discretion continue to invite discrimination based on "traditional ideas about a woman's role in rearing a child." *Id.* at 639.[22] Congress plainly had a basis for concluding that a nondiscretionary federal guarantee was warranted.

[22] Other cases provide additional glimpses into discretionary decision making contaminated by sex discrimination. In *Scevers v. Employment Div.*, 554 P.2d 575 (Or. App. 1976), for example, the Oregon State Employment Appeals Board denied unemployment benefits to a father who was fired for taking two days off to care for his children recovering from measles. The employer testified that "[i]f . . . it was a situation where his wife couldn't take care of the family and it was his obligation to take care of sick children—that it [sic] didn't fit into our permanent plans . . . Generally, the man of the household gets to work." *Id.* at 576. The state treated the absence as "misconduct" disqualifying him from unemployment compensation "only because he was the father of the children and not the mother." *Id.* at 577 (Schwab, J., concurring).

3. Sex discrimination in employment due to stereotypes about family roles

Congress also sought to addresses sex discrimination based on employers' assumptions *ex ante* about women's *potential* family responsibilities. Such discrimination has long been unconstitutional and prohibited under Title VII. States, like public and private employers across the economy, however, continued to deny women jobs and promotions based on generalizations about women's family roles.[23]

[23] *See, e.g.*, *Moore v. Alabama State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala. 1997) (vice president in charge of hiring said he believed that a woman should stay home with her children and that he would not put a married woman in admissions director job, and refused to promote a qualified woman with 14 years of experience once she got pregnant, stating "I was going to put you in charge of that office, but look at you now."); *Arkin v. Oregon*, No. 6:96CV6327 (D. Or. filed Dec. 19, 1996) (alleging tenure denial caused by having taken maternity leave); *Graff v. Eaton*, 60 FEP Cases 990 (Vt. S. Ct. 1991) (state employer denied woman a flextime schedule because he feared that if he granted it, "every female state employee with small children would also want a flextime schedule"); *Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n*, 322 N.W.2d 293 (Iowa 1982) (state fired woman for taking leave after it denied her use of comp time because state suspected her but not male coworkers in similar circumstances of trying to avoid the midnight shift); *Bruno v. City of Crown Point*, 950 F. 2d 355, 366 (7th Cir. 1991) (female paramedic applicant denied EMS position after interviewer asked her questions he did not ask male applicants about how many children she had, her child care arrangements, whether it was "time to have more children," and how her husband would feel about her working 24-hour shifts); *Barbano v. Madison County*, 47 FEP Cases (BNA) 1872 (N.D.N.Y. 1988) (female applicant denied directorship of veterans' service agency after interviewers asked her whether she had plans to have a family and, when she objected that the questions were not relevant, insisted that they "did not want to hire a woman who would get pregnant and quit"); *Stukey v. United States Air Force*, 790 F. Supp. 165 (S.D. Ohio 1992) (female Air Force Attorney-Advisor denied promotion after selecting officials asked her questions it did not ask of male applicants involving, *inter alia*, her marital status and child care arrangements); *Horvath v. U.S. Dep't of Navy*, Federal Equal Opportunity Reporter, (1981) (interviewer asks woman applicant questions not asked of men

Congress heard testimony regarding such discrimination from people with substantial relevant experience.[24] This well

about how many children she had, her babysitting plans, and willingness to work nights and holidays); *Dep't of Fair Employment & Housing v. Flamingo Resort Hotel*, No. 92-03, 1992 WL 223889 at *7 (Cal. F.E.H.C. 1992) (female employee demoted after returning from maternity leave by employer "motivated by the classic sex stereotype that working women with children will inevitably bear most of the parent responsibility and that this will interfere with their work, particularly if it is demanding managerial work."); *King v. Trans World Airlines*, 738 F. 2d 255 (8th Cir. 1984) (interviewer had asked unsuccessful female applicant for kitchen helper job questions not asked of males regarding how many children she had, planned to have and what her childcare plans were); *Goss v. Exxon Office Sys. Co.*, 33 FEP Cases 21 (E.D. Pa. 1983) (manager questioned high-performing woman sales representative about her plans to have a family, responded skeptically to her plans to combine motherhood and career, commented that she was only interested in having children and was not interested in her career, and moved her to inferior territory because of his disapproval of working mothers); *EEOC v. Spokane Concrete Prods.*, 534 F. Supp. 518 (E.D. Wash. 1982) (interviewer for firm that had never hired a woman truck driver asked female applicant questions it did not ask males about her transportation and child care plans); *Anderson v. Hunter, Keith, Marshall & Co.*, 401 N.W.2d 75 (Minn. 1987) (female secretary planning to return to work after maternity leave was fired while on leave "because of problems employers have with mothers who decide not to return to work from their leaves of absence," but "to spare her feelings" employer falsely told outsiders that secretary had quit to stay home and care for her family). Each of these plaintiffs was alerted to the sex discrimination they confronted by the employers' overt statements; legions of others have no doubt experienced similar discrimination without any way to verify that it was happening.

[24] *See The Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 100th Cong., 1st Sess. 235 (1987) (statement of Donna Lenhoff, Associate Director for Legal Policy and Programs, Women's Legal Defense Fund) (testifying that employers still operated under the traditional assumptions that, where work and family conflict, "women's role is to stay home and care for the family and men's role is to work outside the home for a paycheck."); H.R. Rep. 99-699, pt. 1, at 10 (1986); *1986 House Joint Hearing*, at 100 (Women's Legal Defense Fund) ("Historically,

documented discrimination provides a basis for the FMLA's guaranteed sex-neutral right to family leave.

4. Inadequacy of case-by-case litigation to solve the problem

As this Court has noted, Section 5 legislation is needed precisely where "case-by-case litigation [is] inadequate to combat widespread and persistent discrimination." *South Carolina*, 383 U.S. at 328, *Boerne*, 521 U.S. at 526.

That is plainly the case here. The very pervasiveness of the generalization that women have primary responsibility for family care leads many employees to fail to recognize the unconstitutionality of reliance on them. Moreover, men may avoid suing to challenge leave offered only to women due to the risk that, instead of extending the benefits to them, employers will clarify or change their policies to deny them to both sexes.[25] Where sex infects discretionary decisions, the

denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be."); *Family and Medical Leave Act of 1989: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 200 (Statement of Patricia Ashley, Methodist Hospital of Indiana) (witness on behalf of the American Society for Personnel Administration explained that she had worked as a personnel officer with principal hiring authority, and observed that "there are very subtle ways of discriminating against women . . . in a capacity to hire people, I saw it daily, I saw it hourly."); *1987 Post Office Hearing*, at 36 (testimony reporting comment of President of Merchants and Manufacturers Association that Court's *CalFed* decision, would trigger employment discrimination against women based on assumptions regarding their future leave use, and that although "that is illegal, . . . try to prove it."); *1989 House Labor Hearing*, at 196 (Personnel Manager testified: "I can assure you that subtle discrimination is still there, particularly for women who have children . . . targeted at women, not at fathers.").

[25] *See, e.g., Chafee v. Teachers' Pension & Annuity Fund*, 457 A.2d 33, 36 (N.J. Super. 1983) (when male employee challenged practice of

bases for those decisions are often not sufficiently visible to make employees aware that they have been subjected to discrimination. Even if an employee learns that a co-worker took time off to care for a sick relative, he will not ordinarily know the terms on which the leave was granted, and thus whether his own circumstances are comparable. That problem is even more acute where employers deny women jobs or promotions based on assumptions about their future leave needs, given that applicants and employees are seldom privy to the considerations that affect such decisions.

5. Inadequacy of state leave laws

Finally, Congress had a basis for concluding that existing state family leave protections were insufficient to address the discrimination problems that the FMLA targets.[26] It was only "since Federal family leave legislation was first introduced" that the States had even "begun to consider similar family leave initiatives." S. Rep. 103-3 at 20; *see also* S. Rep. 102-68 at 77 (minority views of Sen. Durenberger) ("so few states have elected to enact similar legislation at the state level"). *See Brief of Amici Curiae Women's History Scholars Alice Kessler-Harris, Linda Kerber, et al.* Appendix. Most leaves available under state law were not job-protected, and, as Hibbs' own experience with NCL leave illustrates, left to the employer's discretion whether employees could actually take leave when they needed it. The deficiencies of

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state board permitting only women on parenting leave to purchase pension credits, the state conceded that women on child care leaves may "on occasion" have received the benefit, but interpreted the law to foreclose any future purchase of pension credits by employees for purposes of child care leave.); *see generally Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (equal protection violations can be remedied "by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.").

[26] S. Rep. 103-3 at 4 ("government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family").

the family and medical leave laws of the 13 *amici* states supporting Petitioners illustrate those inadequacies. Of the 13, five (Alabama, Delaware, Indiana, Nebraska, and Virginia)[27] have no comparable family and medical leave law whatsoever.[28] Of the remaining eight, two states that do have family and medical leave laws, two (South Carolina and Tennessee) do not provide job protection,[29] and two (Ohio and Tennessee) fail to provide leave that covers all of the uses provided by the FMLA.[30] Petitioner Nevada's leave law likewise falls short of the FMLA guidelines for job protection.[31] The Senate committee concluded that "it is critical to distinguish between a policy that provides job-guaranteed leave to all workers, as opposed to a case-by-case approach where an employer may or may not grant leave when requested." S. Rep. 102-68 at 35. *See also* S. Rep. 103-3 at 17 ("[E]ven though many employers already have some sort of leave pol-

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[27] Virginia does expressly allow four to five paid days per year of "family and personal leave." Va. Code Ann. § 51:1-1107.

[28] In addition, Michigan, Missouri, Mississippi, New York, and Pennsylvania have no comparable leave laws.

[29] *See* 19 S.C. Code Ann. Regs. 712.01; Tenn. Code Ann. § 4-21-408; Nev. Rev. Stat. 284-360. A number of additional States with leave laws provide no job protection: Iowa (Iowa Admin. Code r. 581-14.4(19A)), North Carolina (N.C. Admin. Code tit. 25, r. 1E.1402 *et seq.*), South Dakota (S.D. Admin. R. 55:01:22:08:02)), and West Virginia (W.Va. Code § 21-5D-4)).

[30] *See* Ohio Rev. Code Ann. § 124.126 (providing only parental leave upon the birth or adoption of a child); Tenn. Code Ann. § 4-21-408 (providing only maternity leave for female employees); Tenn. Code Ann. § 8-50-806 (allowing use of sick leave only for adoptive parents). Many other states providing some type of leave fall short of the FMLA. Louisiana provides only pregnancy disability leave (La. Rev. Stat. Ann. 23:341-342), Minnesota fails to provide family leave (Minn. Stat. § 181.940-942), Montana provides only pregnancy leave (Mont. Code Ann. § 49-2-310 et seq.), and New Hampshire provides only pregnancy leave (N.H. Rev. Stat. Ann. § 354-A:7).

[31] *See* Nev. Rev. Stat. 284.360.

icy, legislation is necessary to ensure that workers receive basic guarantees of job security and continued health insurance coverage.").

Petitioners point to the availability in some States of flexible sick leave policies that allowed employees to use their sick leave to care not only for themselves, but also to care for family members. Pet. Br. 4-S; *Amici Br.* of Alabama *et al.*, 9-14. But Congress specifically found that sick leave "offers little security to employees if employers do not guarantee some minimum length of leave." S. Rep. 103-3 at 15. Many States allowed very few sick leave days to be used for family care, with the most common cap being five days. *See infra* App. Almost every State limits annual accrual of such leave, most commonly to 12 days. Most importantly, such leave is rarely non-discretionary or job-protected. *Id.* (Only four States offer job protections for employees using flexible sick leave, and at least 14 expressly subject such leave to employer discretion). *See infra* App. As explained below, features of FMLA leave are critical to counteracting discrimination based on stereotypes that skew the exercise of discretion.

In sum, the extensive public record of past and current state sex discrimination at the work-and-family fault line, the continuing effects of the stereotypes that such discrimination fostered, and the inadequacy of case-by-case discrimination litigation and insufficiency of state leave laws provided ample basis for Congress to act under Section 5.

E. The FMLA Is A Congruent And Proportional Response To The Intractable National Problem Of Unconstitutional Employment Discrimination Flowing From Stereotypes About Women's Primary Responsibility For Family Care.

The FMLA is a modest, fitting response to the continuing effects of past unconstitutional discrimination by States, as well as to the realities and risks of present sex discrimination. The Act seeks to counteract the pernicious effects of

sex-role stereotyping by assuring that all employees, male and female, have a right to take unpaid leave when needed.

This Court's requirement that any Section 5 remedy be congruent and proportional to the unconstitutionality at which it aims is designed to assure that Congress legislates in accordance with the Court's interpretation of the relevant constitutional right, and does not substantively redefine the right. *See Kimel*, at 81; *Boerne*, at 520. The standard asks whether the contours of the statutory right are drawn in a way that is appropriately related to the underlying constitutional right it seeks to enforce (congruence); and whether the scope of its applicability accords with the scope and gravity of the targeted unconstitutional conduct (proportionality). As discussed above, *see supra*, Point I.A., the fact that Congress was targeting sex discrimination should lead the Court to apply the congruence and proportionality requirement with deference to Congress's choice of remedial means under Section 5: when Congress is addressing discrimination whose existence is established by "volumes of history" and for that reason subject to elevated scrutiny, there is little danger that Congress is redefining the scope of the Fourteenth Amendment.

The FMLA indisputably prohibits some conduct that Article 1 of the Fourteenth Amendment alone does not. There is also no dispute, however, that in enforcing the Equal Protection Clause, Congress may prohibit conduct that this Court's equal protection precedents do not themselves bar. Indeed, a statute can "prohibit very little conduct likely to be held unconstitutional" and still pass muster under this Court's Section 5 review. *Kimel*, 528 U.S. at 88. Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," but may prohibit "a somewhat broader swath of conduct, including that which is not itself prohibited by the Amendment's text," *Kimel*, 528 U.S. at 81; *see Garrett*, 531 U.S. at 365, so long as the legislation is congruent and proportional to targeted unconstitutional discrimination.

1. The FMLA is congruent.

The FMLA closely fits Congress's goal of eliminating sex discrimination in employment caused by sex stereotypes about family roles. By granting a right to a *threshold amount* of unpaid family leave, the FMLA works to cure the disproportionate harm to working women from no-leave policies. At the same time, the FMLA's grant of family leave on sex-neutral grounds was also needed to override policies and practices that extended leave to women and not to men. *See* point I.D.2.a., *supra*. The choice of a 12-week ceiling on FMLA leave applicable only to employers with 50 or more employees was carefully drawn with substantial input from many quarters, including public and private employers, to ensure that it would not impose significant burdens on employers while still providing meaningful, job-protected leave to employees.[32] Although Congress's decision to provide only a relatively short period of unpaid

[32] Congress noted evidence that granting such unpaid leave would result in cost savings from decreased turnover, hiring and training of replacements, and that the net cost to employers of providing job-protected unpaid leave could be as inexpensive as $5.30 to $6.70 per employee per year. *See* S. Rep. 103-3, at 16-18 (1993); *The Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 12, 13, 23, 35, 91 (1991); *see also* S. Rep. 103-3, at 14 (describing survey of a handful of States that did have family and medical leave laws, which revealed that "sizable majorities of covered employers reported that the state laws were neither costly nor burdensome to implement."). That kind of empirically based judgment in the fashioning of legislative remedies is particularly within congressional competence and is entitled to deference. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n. 12 (1985). The congressionally mandated follow-up study on experience with the FMLA reported that the vast majority of employers in fact experienced little or no cost from FMLA compliance. Commission on Leave, United States Department of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 125-26 (1996); *see also Balancing the Needs of Families and Employers, Family and Medical Leave Surveys*, 6-13 (2000 Update).

only a relatively short period of unpaid leave disappointed some advocates, it underscores the FMLA's congruence as a remedy for sex discrimination. To the extent that States might still assume that women are more likely than men to take advantage of the FMLA, limiting the burdens that the leave requirement imposed on employers was an important aspect of preventing the Act from having the perverse effect of enhancing *ex ante* sex discrimination.[33]

Congress's decision to provide *sex-neutral* leave is also congruent to its goal of eliminating sex discrimination in this area. Congress feared that providing family leave rights to women only would "have serious potential for encouraging employers to discriminate" against them. 29 U.S.C. § 2601(a)(6). The FMLA's sex-neutrality sends the important message that families must be free to make their own decisions about which family member—male or female—will perform care-taking duties. "We know that . . . gender matters" in family-care choices at least as much as it does in jury voting patterns, *see J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994) (O'Connor, J., concurring). By making family leave available on sex-neutral terms separately to each individual parent rather than to the family unit, the FMLA helps to prohibit consideration of sex in family leave decisions, and to promote the view that men and women have equal potential at home and at work. That has the secondary benefit of eroding the basis for employers' harmful, sex-stereotyped association between employees' gender and their likely family leave needs - associations that have caused sex discrimination at hiring and promotion stages. The *non-*

[33] Contrary to petitioner's suggestion that the 12-week period was selected based on children's developmental needs, Representative Roukema, a key sponsor of the legislation, testified that parent-child bonding could not be considered a justification for such a short leave period, and that consideration instead should "evolve around other issues, economic, social welfare in terms of women's rights, and the disability aspects of maternal leave." 1986 House Joint Hearing, at 48.

discretionary character of FMLA leave is congruent to the identified risk of exercises of discretion tainted by stereotypes. *See supra*, point I.D.2.b. And the FMLA's *job-protection* provisions respond directly to the problem that leave rights become illusory when employees are deterred from taking them out of fear for their jobs.[34]

2. The FMLA is proportional.

The FMLA's grant of family leave, and its provision for damages suits against States, is also proportional to Congress's goal of remedying the unconstitutional discrimination it targets.

Awards of damages under the FMLA are virtually always modest, but the ability of employees to sue for damages is critically important to the practical effectiveness of the Act. Without any risk of liability for back pay, States could violate the FMLA with impunity. A State could defer reinstatement for many months, such as Nevada has done in Hibbs' case, place the employee in a different, inferior position, or terminate needed insurance coverage of an employee on FMLA leave without increasing its exposure under the Act. A State could entirely ignore the claims of an unlawfully terminated employee unless and until the employee filed suit seeking reinstatement. The importance of private actions for damages as an enforcement mechanism is a classic subject of congressional expertise, to which this Court should grant deference.

The FMLA defines damages restrictively. Employees are entitled *either* to back pay *or* compensation for other actual monetary losses, but not both. 29 U.S.C. § 2617 (a)(1)(A)(i). Actual damages, where available, are conservatively capped at "a sum equal to 12 weeks of wages or salary

[34] *1987 Post Office Hearing* at 33 ("The most immediate cost, the greatest hardship of the legislative vacuum is that working women and men not infrequently lose their jobs when they need to take family or medical leave.").

for the employee." 29 U.S.C. § 2617(a)(1)(A)(i)(II). Similarly, the FMLA is attentive to the public fisc in not authorizing punitive or treble damages, but limiting liquidated damages to a doubling of the compensatory award, and permitting them only where employers act in bad faith and lack reasonable grounds for believing their actions were lawful. 29 U.S.C. § 2617(a)(1)(iii). A State's potential overall damages exposure, even assuming it acted unreasonably or in bad faith, is thus capped at twice the employee's salary for a 12-week period.

Private-sector employers' experience with FMLA damage awards is illustrative. The vast majority of reported FMLA cases to date have not involved any damages. Out of 1,072 FMLA opinions we located,[35] only 31 awarded any damages. In the 25 such cases in which dollar amounts were reflected in the opinions, the mean award was $ 40,000. All but six of the 31 damages cases involved denials of leave under 2612(a)(1)(D), the personal medical leave provision not at issue here. Available information thus suggests that damages exposure for denial of family leave, while an important deterrent and remedy, is not imposing significant burdens on employers.

The FMLA is further tailored to minimize intrusions on employers and respect state sovereignty. For example, the Act expressly excludes from coverage States' elected officials, their staffs, and appointed policy makers. 29 U.S.C. § 2611(3) (incorporating FLSA definition of "employee"). It also permits States to deny restoration of an employee to his or her previous position if "such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer." 29 U.S.C. § 2614(b)(1)(A); 29 C.F.R. 825.216(c). The FMLA does not preempt states

[35] In order to eliminate cases with only a passing reference to the FMLA, we reviewed all decisions appearing in LEXIS federal databases that mentioned "FMLA" at least six times.

from maintaining their own leave programs, 29 U.S.C. § 2651(b), and, if a State gives proper notice, it can require its employees to count time taken under the State's leave programs against the 12-week allotment of FMLA leave. 29 U.S.C. § 2612(d)(2); 29 C.F.R. §§ 825.207, 825.208(a), 825.301(c).

Unlike the ADA and the ADEA, the FMLA applies only to a single form of employment practice, and uses a clear, readily administrable standard. It is also in contrast to the RFRA, which had "sweeping coverage ensur[ing] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter," *Boerne*, 521 U.S. at 532, and which applied a "substantial burden" threshold test that was highly contextual and "difficult to contest," *id.* at 533-534.

Because the discrimination and stereotypes it targeted were not limited to particular geographic areas, Congress acted appropriately in adopting a nationally uniform statute. Contrary to petitioners' suggestions, Pet. Br. at 15-16, 22-23, Section 5 legislation does not "require . . . geographic restrictions." *Boerne*, 521 U.S. at 533. Indeed, even though more than 30 states lacked literacy requirements at the time, the Voting Rights Act's prohibition of English literacy requirements applied nationwide. *Morgan*, 384 U.S. at 643 n.1, 654 n.15. Unlike some of the forms of racial discrimination in voting addressed through geographically focused provisions of the Voting Rights Act, *see South Carolina v. Katzenbach*, 383 U.S. 301, the sex discrimination that the FMLA targets is not a regional phenomenon. The evidence instead reflects sex-based laws, policies, attitudes and practices that long pervaded our national culture, and play a continuing role throughout the nation to this day.

II. THE FMLA'S PRIVATE DAMAGES REMEDY IS APPROPRIATE SECTION 5 LEGISLATION AS APPLIED TO NEVADA'S UNCONSTITUTIONAL RETALIATION AGAINST HIBBS' ASSERTION OF FMLA RIGHTS.

Leaving aside whether there is a private right of action for retrospective relief against States under FMLA Section 2612(a)(1)(C) generally, the decision below may be affirmed on the narrower, independent ground that the FMLA is constitutional as applied to Hibbs' retaliation claim. In revoking Hibbs' state NCL leave in response to his disputing Nevada's interpretation of the FMLA, respondents violated not only 29 U.S.C. § 2615(a)(2) (barring adverse action against anyone "for opposing any practice made unlawful" by the FMLA), but also violated Hibbs' constitutional right as a public employee to assert a federally protected right and to express himself in a nondisruptive manner on a matter of public concern. Hibbs' case is squarely distinguishable on this ground from the Court's other recent precedents, none of which involved a claim that the specific state conduct at issue was itself unconstitutional.[36] Because application of the FMLA damages remedy to the State is, at a minimum, constitutional as applied against state action that is itself unconstitutional, the FMLA's damages remedy is appropriate here without regard to whether it also appropriately extends to constitutionally valid state conduct. *See* Point I. The Court should thus

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[36] *See Garrett*, 531 U.S. at 362 (challenging failures to accommodate leave request of one plaintiff undergoing chemotherapy, and changes to shift or duties requested by other plaintiff to relieve asthma and sleep apnea); *Kimel*, 528 U.S. at 69-71 (no suggestion in facts of irrational or invidious age-based actions that would violate equal protection); *Florida Prepaid*, 527 U.S. at 643 (no due process violation even if State infringed patent because Florida law provides a state-law remedy); *Boerne*, 521 U.S. at 511-12 (denial of church's application for building permit under neutral, generally applicable law did not violate free exercise of religion). *But see Florida Prepaid*, 527 U.S. at 653-54 (Stevens, J., dissenting).

affirm on this ground, or at least remand the case for consideration of this narrower theory, which the court of appeals did not find necessary to decide given that court's validation of Section 2612(a)(1)(C) in its entirety.

Congress unquestionably has authority under Section 5 to authorize a private right of action for state action that violates the Constitution. *See, e.g.*, *Ex Parte Virginia*, 100 U.S. (10 Otto) 339 (1879); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). To overcome a state sovereign immunity defense in these circumstances, a plaintiff need not make the showings of a pattern of predicate unconstitutional actions or of congruence and proportionality that the Court has required in cases of constitutionally permissible state action falling within statutory buffer zones. A clear statement of congressional intent to abrogate suffices. *See Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). It is only when Congress prohibits otherwise constitutionally valid conduct and the claim falls in the statutory buffer zone that this Court's precedents require predicate patterns of unconstitutionality and congruence and proportionality. *Garrett*, 531 U.S. at 365 (Section 5 legislation "reaching beyond the scope of § 1's actual guarantees must exhibit" congruence and proportionality"); *Boerne*, 521 U.S. at 530 ("preventive rules" require a showing of congruence and proportionality); *see Kimen v. New Hampshire Department of Corrections*, 301 F. 3d 13 (1st Cir. 2002).

Hibbs presented sufficient evidence supporting his retaliation claim to meet the evidentiary threshold applicable at the summary judgment stage. Hibbs first voiced to petitioners his objection to their misinterpretation of the FMLA on November 3, 1997, and two days later, on November 5, they made an abrupt about-face, not only retroactively revoking his FMLA leave, but also revoking their initial approval of Hibbs' request for renewed Nevada catastrophic leave. The very next day petitioners for the first time threatened disciplinary action if Hibbs did not return to work. This sequence of events raises an inference of retaliatory motive on petitioners' part that a factfinder would be permitted to credit.

See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (close temporal proximity between employer's awareness of protected activity and adverse employment action can give rise to an inference of retaliatory motive).

Because Hibbs alleges that he was subjected to unconstitutional state conduct, there is no warrant for the broad review and facial invalidation of the FMLA that Nevada requests. Absent First Amendment overbreadth claims, this Court will not strike down a statute on its face unless the statute is unconstitutional as applied to the party seeking its invalidation. *See United States v. Raines*, 362 U.S. 17, 21 (1960). Because Section 2612(a)(1)(C), as implemented through the FMLA's anti-retaliation provision, 2615(a)(2), is constitutionally valid as applied to Nevada in this case, the State lacks standing to seek its facial invalidation. Moreover, in mounting a facial challenge, Nevada would have to "establish that no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987). "[T]he fact that the [statute in question] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.*; *see also INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) (fact "[t]hat the regulation may be invalid as applied in [particular] cases . . . does not mean that the regulation is facially invalid"). Because at a minimum the FMLA validly provides a remedy against Nevada's unconstitutional retaliation, the Court should reject petitioners' facial challenge.

The FMLA's damages remedy for retaliation is appropriate as applied to enforce Hibbs' constitutional rights. State retaliation for the mere assertion of an admittedly federally protected right is wholly arbitrary and "shocks the conscience" *Rochin v. California*, 342 U.S. 165, 172 (1952). *See Garrett*, 531 U.S. at 376 (Kennedy, J., concurring) (emphasizing that what is at issue is not the right, but the remedy). In addition, retaliation against public employees for nondis-

ruptive speech on matters of public concern violates the First Amendment. *Pickering v. Board of Educ.*, 391 U.S. 563, 573-74 (1968); *Connick v. Myers*, 461 U.S. 138, 154 (1983). Even employee speech that is motivated by a desire to defeat adverse employment action may still address matters of public concern. *See Connick*, 461 U.S. at 141, 150. The fact that Hibbs asserted his rights privately does not defeat this claim. First Amendment protection "is [not] lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979); *see Rankin v. McPherson*, 483 U.S. 378, 386 n.11 (1987) (same); *Connick*, 461 U.S. at 152-54.[37] Here, just as in *Givhan*, what is at stake is an employee assertion, made privately to a supervisor in the context of a disputed personnel action, that an employer was violating important federal rights. Hibbs' statements are matters of public concern under this Court's precedents.[38]

CONCLUSION

The judgment of the Court of Appeals should be affirmed, and the case remanded for further proceedings.

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[37] Opposition to practices that the FMLA makes unlawful as a matter of federal civil rights law is more than mere "complaint about a change in the employee's own duties," *United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995), or garden-variety "criticism directed at a public official," *Connick*, 461 U.S. at 149.

[38] Petitioners mischaracterize the issue and the Ninth Circuit's precedent upon which they rely when they argue that there can be no retaliation claim where there is no underlying private right of action. *See* Reply Brief for Petitioners at 8 (petition stage). Even assuming that sovereign immunity bars a private right of action against Nevada for denying leave under 2612(a)(1)(C), petitioners concede, as they must, that state employees still have a federal right to such leave. When such leave reasonably appears to have been unlawfully denied and a state employee exercises his right to voice opposition to the denial, Congress's clear authorization of a private right of action validly abrogates sovereign immunity as applied to such a constitutional claim.

Respectfully submitted,

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APPENDIX

CURRENT STATE FLEXIBLE SICK LEAVE LAWS

STATE	Maximum Use Per Year	Accrual Limits Per Year	Expressly Subject to Employer Discretion	Non-covered*
AL		12 days	Y	P
AK		24 days	Y	--
AZ	5 days	12 days**	Y	P
AR		12 days	Y	P
CA	5 days	12 days	N	P
CO		10 days	N	P
CT	3 days	15 days	N	PD, P
DE		--	N	FM, CM
DC		--	N	--
FL	6 days	13 days**	N	P
GA		15 days**	Y	PD, P
HI	**NO FLEXIBLE SICK LEAVE LAW**			
ID		12 days	N	P
IL		12 days	N	P

* CM = Child Medical; FM = Family Medical; P = Parental; PD = Pregnancy Disability

** Separate sick leave provision for part-time employees. See accompanying text, *infra*.

STATE	Maximum Use Per Year	Accrual Limits Per Year	Expressly Subject to Employer Discretion	Non-covered*
IN		9 days**	N	PD, P
IA	5 days	18 days**	Y	P
KS		12 days	N	--
KY		12 days**	N	P (excl.: school empl.)
LA	NO FLEXIBLE SICK LEAVE LAW			
ME		12 days	Y	PD, P
MD		15 days	N	--
MA		15 days	Y	--
MI		12 days	Y	P
MN		--	N	FM, PD, P
MS		18 days	N	PD, P
MO		15 days	Y	P
MT		12 days	N	--
NE		12 days	N	P
NV	15 days	15 days	N	P

* CM = Child Medical; FM = Family Medical; P = Parental; PD = Pregnancy Disability

** Separate sick leave provision for part-time employees. See accompanying text, *infra*.

STATE	Maximum Use Per Year	Accrual Limits Per Year	Expressly Subject to Employer Discretion	Non-covered*
NH	5 days	15 days	N	P
NJ	Reas. Pd.	12 days**	N	P
NM		11 days**	N	P
NY	15 days	12 days**	Y	P
NC		12 days**	N	--
ND	5 days	12 days	N	PD, P
OH		9.3 days	Y	P
OK		15 days	N	--
OR		Personnel Division	N	FM, CM, PD
PA	5 days	13 days	N	PD, P
RI	10 days	14 days**	N	--
SC	8 days	15 days	N	P (excl.: adopt p's)
SD	5 days	14 days	N	P
TN		12 days	Y	--
TX		12 days**	N	P

* CM = Child Medical; FM = Family Medical; P = Parental; PD = Pregnancy Disability

** Separate sick leave provision for part-time employees. See accompanying text, *infra*.

STATE	Maximum Use Per Year	Accrual Limits Per Year	Expressly Subject to Employer Discretion	Non-covered*
UT		12 days	N	--
VT	NO FLEXIBLE SICK LEAVE LAW			
VA		4 days	N	--
WA	5 days	12 days	N	--
WV	5 days	18 days**	N	P
WI	5 days per illness	15 days	N	P
WY		12 days	Y	P

* CM = Child Medical; FM = Family Medical; P = Parental; PD = Pregnancy Disability

** Separate sick leave provision for part-time employees. See accompanying text, *infra*.

CURRENT STATE FLEXIBLE SICK LEAVE LAWS

ALABAMA

- ACCRUAL LIMITS

  ALA. ADMIN. CODE r. 670-X14-.01(1) (2001) ("An allowance of four hours for each bi-weekly period of service shall be made for sick leave. Unused portions of such allowance may accumulate but not to exceed a maximum of 150 days").

- EXPRESSLY SUBJECT TO DISCRETION

  ALA. ADMIN. CODE r. 670-X14-.01(1)(b)(3), (1)(c) (2001) ("Sick leave is hereby defined to mean absence from duty of an employee because of: attendance upon members of the immediate family whose illness requires the care of such employee"); ("Sick leave with pay is not a right for which employees may make demand, but a privilege granted in accordance with prescribed rules and regulations, to which the Board may make exceptions as the best interest of the service demand.").

ALASKA

- ACCRUAL LIMITS

  ALASKA STAT. § 39.20.200(a)(1)-(4) (Michie 2001) ("Officers and employees of the state are entitled to personal leave with pay that accrues as follows: (1) two days for each full monthly pay period in the case of officers and employees with less than two years of service; (2) two and one-quarter days for each full monthly pay period in the case of officers and employees with two but less than five years of service; (3) two and one-half days for each full monthly pay period in the case of officers and employees with five but less than ten years of service; (4) three days for each full monthly pay

period in the case of officers and employees with 10 years or more of service.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  ALASKA STAT. § 39.20.225(b) (Michie 2001) ("An officer or employee may take personal leave for medical reasons, regardless of whether business permits, upon permission by the head of the department or agency for which the officer or employee works. A department or agency head shall grant personal leave for medical reasons if the department or agency head is satisfied that the officer or employee is absent for medical reasons. The taking of personal leave for medical reasons shall be reduced by the amount of wage continuation payments under AS 23.30 (Alaska Workers' Compensation Act). The following constitute 'medical reasons' and are subject to the conditions noted: ... (2) medical disability of a member of an officer's or employee's immediate family is a medical reason for taking personal leave if the disability is such that the attendance of the officer or employee is required.").

ARIZONA

- **MAXIMUM USE**

  ARIZ. ADMIN. CODE R2-5-404(A)(4) (2002) ("Sick leave is any approved period of paid absence granted an employee due to ... Illness, injury, examination, or treatment by a licensed health care practitioner of an employee's spouse, dependent child, or parent. For purposes of this Section, the term 'dependent child' is defined as a natural child, an adopted child, a foster child, or a step child, over 1/2 of whose support is received from the employee. The term 'parent' is defined as a birth parent, adoptive parent, stepparent, grandparent, parent-in-law, or anyone who can be considered 'in loco

parentis', i.e., someone who assumed the responsibility of a parent. Sick leave granted for this purpose [(to care for spouse, dependent child, or parent)], shall be charged to the employee's sick leave account and shall not exceed 40 hours per calendar year.").

- **ACCRUAL LIMITS**

  ARIZ. ADMIN. CODE R2-5-404(B)(1), (2) (2002) ("All state service employees, except seasonal, temporary, emergency clerical pool, and part-time employees, shall accrue sick leave at a rate of 8 hours per month."), ("Part-time employees who work ¼ time, ½ time, or ¾ time will accrue a proportional amount of sick leave. Part time employees who work a percentage of full-time other than ¼ time, ½ time, or ¾ time will accrue sick leave at the next lower rate.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  ARIZ. ADMIN. CODE R2-5-404(a)(4), (D)(1) (2002) ("Sick leave is any approved period of paid absence granted an employee due to ... Illness, injury, examination, or treatment by a licensed health care practitioner of an employee's spouse, dependent child, or parent."); ("Sick leave may be taken when approved by the agency head.").

ARKANSAS

- **ACCRUAL LIMITS**

  ARK. CODE ANN. § 21-4-207(a) (Michie 2001) ("Each permanent or probationary employee shall be entitled to sick leave with full pay computed on the basis of one (1) day for each complete month of service including the probationary period.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  ARK. CODE ANN. § 21-4-206(b) (Michie 2001) ("Sick leave may also be granted employees due to

a death or serious illness of a member of the employee's immediate family. For the purposes of this subsection, 'immediate family' shall mean the father, mother, sister, brother, husband, wife, child, grandmother, grandfather, in-laws, or any individual acting as parent or guardian of an employee.").

CALIFORNIA

- **MAXIMUM USE**

  CAL. CODE REGS. tit. 2, § 599.745(d) (2002) (" 'Sick leave' means the necessary absence from duty of an employee because of: Required attendance, not to exceed five days in any calendar year, upon the employee's ill or injured mother, father, husband, wife, son, daughter, brother or sister, or any person residing in the immediate household of the employee except servants, roomers, or roommates.").

- **ACCRUAL LIMITS**

  CAL. CODE REGS. tit. 2, § 599.746 (2002) ("On the first day of the monthly pay period following completion of each monthly pay period of continuous service as defined in Section 599.608, each full-time employee in the state civil service shall be allowed one day of credit for sick leave with pay.").

COLORADO

- **ACCRUAL LIMITS**

  4 CO. CODE REGS. § 801, P 5-11 (2002) (6.66 Hours per month)

CONNECTICUT

- **MAXIMUM USE**

  CONN. AGENCIES REGS. § 5-247-4(a)(3) (2002) ("An eligible employee shall be granted sick leave in the event of critical illness or severe injury to a

member of the immediate family creating an emergency, provided that not more than three days of sick leave per calendar year shall be granted therefore").

- **ACCRUAL LIMITS**

  CONN. AGENCIES REGS. § 5-247-2(a)(1)-(4) (2002) ("Sick leave accrues at the rate of one and one-quarter working days per completed calendar month of continues full-time service, which may be computed on an hourly basis, including authorized leave with pay provided that: (1) such leave starts to accrue only on the first working day of the calendar month and is credited to the eligible employee on the completion the the [*sic*] calendar month; (2) an eligible employee employed on less than a full-time basis shall be granted leave in proportion to the amount of time worked as recorded in the attendance and leave records; (3) no such leave will accrue for any calendar month in which an employee is on leave of absence without pay an aggregate of more than three working days; (4) sick leave shall accrue for the first twelve months in which an employee is receiving compensation benefits in accordance with section 5-142 or 5- 143 of the General Statutes.")

FLORIDA

- **MAXIMUM USE**

  FLA. ADMIN. CODE ANN. r. 60L-23.006(2) (2002) ("sick leave shall be authorized for illness or injury of a member of the employee's immediate family, as defined in 60K-5.013(8)(a), F.A.C., up to a maximum of 6 days (48 hours) during any calendar year when the employee's presence with the family member is necessary.").

- **ACCRUAL LIMITS**

  FLA. ADMIN. CODE ANN. r. 60K-5.030(1)(a)-(b) (2002) ("Full-time employees filing established positions who are paid on a monthly basis shall earn 8 hours and 40 minutes of sick leave for each full calendar month of employment, and full-time employees filing established positions who are paid on a biweekly basis shall earn 4 hours of sick leave for each full biweekly period worked."), ("Part-time employees who regularly work a fixed percentage of the pay period shall earn sick leave credits for the hours worked during that pay period proportionate to the time worked.").

GEORGIA

- **ACCRUAL LIMITS**

  GA. COMP. R. & REGS. r. 478-1-.18, § 18.300 (2001) ("A full-time employee compensated on a semi-monthly basis shall, at the end of each pay period, earn five (5) hours sick leave provided the employee is in pay status for at least forty (40) hours during the pay period. A full-time employee compensated on a monthly basis shall, at the end of each pay period, earn ten (10) hours sick leave provided the employee is in pay status for at least eighty (80) hours during the pay period. A part-time employee who works twenty (20) hours or more per week shall earn sick leave as specified in Par. 18.301.1; provided, however, such earnings and limitations shall be prorated by the percentage of time worked. The percentage of time worked shall be determined by dividing the employee's standard hours by forty (40).").

- **EXPRESSLY SUBJECT TO DISCRETION**

  GA. COMP. R. & REGS. r. 478-1-.18, § 18.303 (2001) ("Upon approval of the appointing authority an employee may use accrued sick leave for absence

due to personal illness or disability; absence necessitated by exposure to contagious disease by reason of which exposure the health of others would be endangered by the employee's attendance on duty; absence for dental or medical care; and for absence due to dental care or medical care, illness, accident or death in employee's immediate family which requires employee's presence.").

IDAHO

- **ACCRUAL LIMITS**

  IDAHO CODE § 67-5333(1) (2002) ("The rate per hour at which sick leave shall accrue to classified officers and employees earning credited state service shall be at the rate represented by the proportion 96/2080. Sick leave shall accrue without limit, and shall be transferable from department to department.").

ILLINOIS

- **ACCRUAL LIMITS**

  ILL. ADMIN. CODE tit. 80, § 303.90 (2002) ("All employees, excepting those in emergency, intermittent, per diem or temporary status, unless such status is the result of accepting a non-permanent working assignment in another class, shall accumulate sick leave at the rate of one day for each month's service.").

INDIANA

- **ACCRUAL LIMITS**

  IN. ADMIN. CODE tit. 31, r.2-11-4(b) (2002) ("Sick leave with pay shall accrue to full-time employees in the classified service at the rate of seven and one-half (7.5) hours for every two (2) full months of employment; plus seven and one-half (7.5) additional hours for every four (4) months of full-time employment. Employees working on a part-

time basis shall earn sick leave at the rate of three and three-fourths (3.75) hours for every two (2) months of employment; plus three and three-fourths (3.75) additional hours for every four (4) months of employment. Sick leave will not accrue to hourly, per diem, temporary, intermittent, or contractual employees or employees working less than half time.").

IOWA

- **MAXIMUM USE**

  IOWA ADMIN. CODE r. 581-14.3(19A) (2002) ("Employees may also use accrued sick leave, not to exceed a total of 40 hours per fiscal year, for the following purposes … For the temporary care of, or necessary attention to members of the immediate family.").

- **ACCRUAL LIMITS**

  IOWA CODE ANN. § 70A.1 (2002) ("Commencing July 1, 1979, permanent full-time and permanent part-time employees of state departments, boards, agencies, and commissions, excluding employees covered under a collective bargaining agreement which provides otherwise, shall accrue sick leave at the rate of one and one-half days for reach complete month of full-time employment. The accrual rate for part-time employees shall be prorated to the accrual rate for full-time employees. Sick leave shall not accrue during any period of absence without pay. Employees may use accrued sick leave for physical or mental personal illness, bodily injury, medically related disabilities, including disabilities resulting from pregnancy and childbirth, or contagious disease").

  IOWA ADMIN. CODE r. 581-14.3(19A) (2002) ("Probationary and permanent employees shall accrue sick leave at the rate of one and one-half

days (5.54 hours for the first and second biweekly pay periods, and 5.52 hours for the third biweekly pay period) for each month of full-time employment.")

- **EXPRESSLY SUBJECT TO DISCRETION**

  IOWA ADMIN. CODE r. 581-14.3(19A) (2002) ("Employees may also use accrued sick leave, not to exceed a total of 40 hours per fiscal year, for the following purposes: … For the temporary care of, or necessary attention to members of the immediate family. This leave shall be granted at the convenience of the employee whenever possible and consistent with the staffing needs of the appointing authority.").

KANSAS

- **ACCRUAL LIMITS**

  KAN. ADMIN. REGS. 1-9-5(b) (2001) ("The maximum sick leave credit an employee may accrue in any payroll period shall be 3.7 hours.").

KENTUCKY

- **ACCRUAL LIMITS**

  101 KY. ADMIN. REGS. 2:102 § 2(1)(a), (d), (e) (2001) ("An employee, except a part-time employee, shall accumulate sick leave with pay at a rate of one (1) working day per month."), ("A full-time employee who completes 120 months of total service with the state shall be credited with ten (10) additional days of sick leave upon the first day of the month following completion of 120 months of service."), ("A full-time employee who completes 230 months of total service with the state shall be credited with another ten (10) additional days of sick leave upon the first day of the month following completion of 240 months of service."), ("A employee with 240 or more months of total service

at the time of implementation of this section shall have the additional ten (10) days credited to the sick leave balance.").

KY. REV. STAT. ANN. § 161.155(2) (2001) ("Each district board of education shall allow to each teacher in its common school system not less than ten (10) days of sick leave during each school year, without deduction of salary.").

MAINE

- **ACCRUAL LIMITS**

  CODE ME. R. § 02-289, ch. 11, sec. 2(C)(1)(a) (2002) ("Sick leave shall be earned by each employee in the classified service, except temporary, emergency or project employees, at the rate of one (1) working day for each completed full month of service.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  CODE ME. R. § 02-289, ch. 11, sec. 2(C)(4)(d) (2002) ("Employees may utilize their allowance of sick leave on the basis of application therefor approved by their respective appointing authorities and reported to the Director of Human Resources, for absences necessitated by illness or death in the immediate family of employees for such periods as the attendance of the employees shall be necessary. Immediate family as used here shall mean the spouse and the parents of the spouse; and the parents, guardian, children, brothers, sisters or wards of the employee.").

MARYLAND

- **ACCRUAL LIMITS**

  MD. CODE ANN., STATE PERS. & PENS. § 9-502 (2002) ("Fifteen days, not to exceed 120 hours of sick leave accrue to an employee each year on a pro

rata basis, from the beginning of the employee's State service.").

MASSACHUSETTS

- **ACCRUAL LIMITS**

  Rules Governing Paid Leave and Other Benefits for Managers and Confidential Employees as authorized by MASS. GEN. LAWS. ch. 7, § 28 (2002) (4.01 "Full-time employees shall accumulate sick leave with pay credits not to exceed 15 working days for each year of service (1.25 days/month)").

- **EXPRESSLY SUBJECT TO DISCRETION**

  Rules Governing Paid Leave and Other Benefits for Managers and Confidential Employees as authorized by MASS. GEN. LAWS. ch. 7, § 28 (2002) (4.07 "Sick leave shall be granted, at the discretion of the Appointing Authority, to employees only under the following conditions: Caring for the spouse, child, foster child, step child, parent, step parent, brother, sister, grandparent, grandchild of either the employee or his/her spouse, person for whom employee is legal guardian, or for a person living in the employee's immediate household who is seriously ill.").

MICHIGAN

- **ACCRUAL LIMITS**

  MICH. ADMIN. CODE r. 5.10(3)(A) (2001) ("Every career employee is credited with four hours of sick leave for each completed 80 hours of service.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  MICH. ADMIN. CODE r. 5.10(3)(B)(1), (4) (2001) ("Any use of sick leave by an employee must have the approval of the appointing authority."), ("Sick leave may be used by an employee for any of the following reasons: Personal illness, injury, serious health condition, temporary disability, exposure to

contagious disease endangering others, or for illness or injury in the immediate family which necessitates absence from work.").

MISSISSIPPI

- ACCRUAL LIMITS

  MISS. CODE ANN. § 25-3-93(1)(a) (2001) (One month to 3 years accrues 12 hours per month, 18 days per year; 37 months to 8 years accrues 14 hours per month, 21 days per year; 97 months to 15 years accrues 16 hours per month, 24 days per year; over 15 years accrues 18 hours per month, 27 days per year).

MISSOURI

- ACCRUAL LIMITS

  MO. CODE OF REGS. ANN. tit. 1, § 20-5.020(2)(B)(1) (2002) ("Employees who are employed on a full-time basis in positions of a continuing or permanent nature shall be allowed sick leave with full pay as follows: If they are paid on a monthly pay period, computed at the rate of ten (10) hours for reach calendar month of service in which they are in pay status for one hundred sixty (160) or more hours. Sick leave will be credited at the rate of one-half (1/2) the full-time accrual rate for months in which they are in pay status from eighty to one hundred nineteen (80-119) hours and three-fourths (3/4) the full-time rate for months in which they are in pay status from one hundred twenty to one hundred fifty-nine (120-159) hours.").

- EXPRESSLY SUBJECT TO DISCRETION

  MO. CODE OF REGS. ANN. tit. 1, § 20-5.020(2)(K) (2002) ("Loss of time due to an illness of the employee's spouse, children, other relatives or members of the employee's household, which requires the employee's personal care and attention

shall be charged against the employee's accumulated sick leave. The final decision concerning the granting of leave under this section shall rest with the appointing authority and shall be based upon the degree to which the employee is responsible for providing personal care and attention").

MONTANA

- ACCRUAL LIMITS

  MONT. CODE ANN. § 2-18-618(1) ("A permanent full-time employee earns sick leave credits from the first day of employment. For calculating sick leave credits, 2,080 hours (52 weeks x 40 hours) equals 1 year. Sick leave credits must be credited at the end of each pay period. Sick leave credits are earned at the rate of 12 working days for each year of service without restriction as to the number of working days that may be accumulated. Employees are not entitled to be paid sick leave until they have been continuously employed 90 days.").

NEBRASKA

- ACCRUAL LIMITS

  NEB. ADMIN. CODE ch. 9, § 005 (2002); NEB. ADMIN. CODE ch. 2, § 007 (2002) (First year through fifth year, 12 days; sixth year, 17 days; seventh year, 18 days; eighth year, 19 days; ninth year, 20 days; tenth year, 21 days; eleventh year, 22 days; twelfth year, 23 days; thirteenth year, 24 days; fourteenth year, 25 days; fifteenth year, 26 days; sixteenth year, 27 days; seventeenth year, 29 days; nineteenth year and more, 30 days; maximum accrual, 180 days).

NEVADA

- **MAXIMUM USE**

  NEV. ADMIN. CODE ch. 284.558(1) (2002) ("Except as otherwise provided in this section, if an employee is needed to provide care for a member of his immediate family with an illness or other authorized medical need, the employee may use his accumulated sick leave, not to exceed 120 hours in any 1 calendar year. An employee is not subject to this 120-hour rule if the leave is approved under the Family and Medical Leave Act.").

- **ACCRUAL LIMITS**

  NEV. REV. STAT. 284.355(1) (2002) ("Except as otherwise provided in this section, all employees in the public service, whether in the classified or unclassified service, are entitled to sick and disability leave with pay of 1 1/4 working days for each month of service, which may be cumulative from year to year.").

NEW HAMPSHIRE

- **MAXIMUM USE**

  N.H. CODE ADMIN. R. ANN. PER. 1204.05(c) (2002) ("An employee shall be entitled to utilize up to 5 days of sick leave per fiscal year for the care of dependents residing in the employee's household.").

- **ACCRUAL LIMITS**

  N.H. CODE ADMIN. R. ANN. PER. 1204.05(b) (2002) (Zero to eight continuous years of work, 15 days accrued; nine to fifteen continuous years of work, 15 days accrued; sixteen continuous years of work or more, 15 days accrued).

NEW JERSEY

- **MAXIMUM USE**

  N.J. ADMIN. CODE tit. 4A, § 6-1.3(g)(3) (2002) ("Sick leave may be used by employees who are unable to work because of: Care for a reasonable period of time, of a seriously ill member of the employee's immediate family").

- **ACCRUAL LIMITS**

  N.J. ADMIN. CODE tit. 4A, § 6-1.3(a)(1)-(2), (b) (2002) ("Full-time State employees shall be entitled to annual paid sick leave as set forth in (a)1 and 2. Full-time local employees shall be entitled to a minimum of annual paid sick leave as follows: 1. New employees shall only receive one working day for the initial month of employment if they begin work on the 1st through 8th day of the calendar month, and one-half working day if they begin on the 9th through the 23rd day of the month. 2. After the initial month of employment and up to the end of the first calendar year, employees shall be credited with one working day for each month of service. Thereafter, at the beginning of each calendar year in anticipation of continued employment, employees shall be credited with 15 working days."), ("Part-time employees shall be entitled to a proportionate amount of paid sick leave.").

NEW MEXICO

- **ACCRUAL LIMITS**

  N.M. ADMIN. CODE tit. 1, § 1.7.7.10(A), (B) (2001) ("Employees, except those on full-time educational leave with pay, absence without leave, leave without pay, unpaid FMLA leave, or suspension, shall accrue sick leave at the rate of 3.69 hours per pay period."), ("Employees employed on a part-time

basis and employees on furlough who work at least eight hours in a pay period shall accrue sick leave on a prorated basis.").

NEW YORK

- MAXIMUM USE

  N.Y. COMP. CODES R. & REGS. tit. 4, § 28-2.1(g) (2002) ("In addition to personal illness of the employee, the following types of leaves of absence when approved by the appointing authority, may be charged against accumulated sick leave credits: illness or death in the employee's family, provided, however, that charge for such absence shall not exceed a maximum of 15 days in any one year").

- ACCRUAL LIMITS

  N.Y. CIV. SERV. APP. § 21.3(b) (2002); N.Y. COMP. CODES R. & REGS. tit. 4, § 28-2.1(b) (2002) ("Employees shall earn sick leave credits at the rate of one-half day per biweekly pay period and may accumulate such credits up to a total of 150 days; provided, however, that an employee shall not earn sick leave credit for any biweekly pay period unless he is in full pay status for at least seven work days during such biweekly pay period. A part-time employee who is required to work a fixed number of hours, five days per week, shall also earn sick leave credit as provided herein, but his total pay when absent on such leave shall be the amount which would have been due him had he been working regularly at his usual hours for such period.").

  N.Y. COMP. CODES R. & REGS. tit. 4, § 28-2.1(c) (2002) ("Employees who are on the payroll on the date on which sick leave credits are otherwise to be granted shall be entitled to eight days of sick leave credits for each 12 months of service up to a total of 200 days. Effective January 1, 2000, up to 200 days of such credits may be used to pay for health

insurance in retirement in accordance with section 167(4) of the Civil Service Law. Such sick leave shall be credited as follows: (1) Four days of sick leave credits upon completion of six months of State service; provided, however, that any eligible employee electing to participate in the Income Protection Plan pursuant to Part 78 of this Title (President's Regulations) shall immediately receive four days of such sick leave credit on the effective date of such election. (2) Part-time employees shall be granted sick leave credits not to exceed four days following completion of each six months of State service which credits shall be prorated based on the percentage of full-time service such employee is scheduled to work on each sick leave grant.").

- EXPRESSLY SUBJECT TO DISCRETION

  N.Y. COMP. CODES R. & REGS. tit. 4, § 28-2.1(g) (2002) ("In addition to personal illness of the employee, the following types of leaves of absence when approved by the appointing authority, may be charged against accumulated sick leave credits: illness or death in the employee's family, provided, however, that charge for such absence shall not exceed a maximum of 15 days in any one year").

  N.Y. CIV. SERV. APP. § 21.3(f) (2002) ("In addition to personal illness of the employee, the following types of leaves of absence when approved by the appointing authority, may be charged against accumulated sick leave credits: illness or death in the employee's family, provided, however, that charge for such absence shall not exceed a maximum of 15 days in any one year").

NORTH CAROLINA

- ACCRUAL LIMITS

  N.C. ADMIN. CODE tit. 25, r. 1E.0301(a)-(b) (2002) ("Sick leave credits at the rate of 8 hours per

month or 96 hours per year shall be provided for a full-time or part-time (half-time or over) employee with a permanent, trainee, probationary or time-limited appointment who is in pay status for one-half of the regularly scheduled workdays and holidays in a pay period."). ("Leave for part-time employees shall be computed as a percentage of total amount provided to a full-time employee.").

NORTH DAKOTA

- **MAXIMUM USE**

  N.D. CENT. CODE § 54-52.4-03 (2001) ("An employer that provides leave for its employees for illnesses or other medical or health reasons shall grant an employee's request to use that leave to care for the employee's child, spouse, or parent if the child, spouse, or parent has a serious health condition. An employee may take not more than forty hours of leave under this section in any twelve-month period. The employer shall compensate the employee for leave used by the employee under this section on the same basis as the employee would be compensated if the leave had not been taken due to the employee's own illness.").

  N.D. ADMIN. CODE § 4-07-13-07(3) (2002) ("Sick leave may be used by an employee when: The employee wishes to attend to the needs of the employee's eligible family members who are ill or to assist them in obtaining other services related to their health or well-being. Sick leave used for these purposes may not exceed forty hours per calendar year.").

- **ACCRUAL LIMITS**

  N.D. ADMIN. CODE § 4-07-13-04 (2002) (Zero to all years of services accrues 8 hours per month).

OHIO

- **ACCRUAL LIMITS**

  OHIO REV. CODE ANN. § 124.382(B) (West 2002) ("Each full-time permanent and part-time permanent employee whose salary or wage is paid directly by warrant of the auditor of state shall be credited with sick leave of three and one-tenth hours for each completed eighty hours of service, excluding overtime hours worked.").

  OHIO REV. CODE ANN. § 3319.141 (West 2002) ("Each person who is employed by any board of education in this state shall be entitled to fifteen days sick leave with pay, for each year under contract, which shall be credited at the rate of one and one-fourth days per month.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  OHIO REV. CODE ANN. § 124.382(D) (West 2002) ("Employees may use sick leave, provided a credit balance is available, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the employee's immediate family.").

  OHIO REV. CODE ANN. § 3319.141 (West 2002) ("Teachers and nonteaching school employees, upon approval of the responsible administrative officer of the school district, may use sick leave, for absence due to personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the employee's immediate family.").

OKLAHOMA

- **ACCRUAL LIMITS**

  OKLA. ADMIN. CODE § 530:10-15-10(c) ("Annual and sick leave accrual rates and accumulation limits are based on cumulative periods of employment calculated in a manner that cumulative service is determined for longevity purposes [74:840-2.20(1)];" Schedule A and Schedule B 15 days of sick leave accrued per year.).

OREGON

- **ACCRUAL LIMITS**

  OR. REV. STAT. ANN. § 240.551 ("The Personnel Division shall establish the hours of work, holidays, leaves of absence with and without pay and vacations of employees in the state classified service. The division may delegate this responsibility to individual operating agencies where appropriate.").

PENNSYLVANIA

- **MAXIMUM USE**

  4 PA. ADMIN. CODE § 30.23(5) (2002) ("Sick leave shall be granted when an employee is required to be absent from work for one of the following reasons: Serious illness of a member of the employee's immediate family which requires the employee's absence from work not to exceed 5 days in a calendar year. Immediate family is defined as the following persons: Husband, wife, child, stepchild, parent, brother or sister of the employee.").

- **ACCRUAL LIMITS**

  4 PA. ADMIN. CODE § 30.22(a) (2002) (Employees who work 37.5 hours a week accrue 97.5 sick leave hours per year; employees who work 40 hours a week accrue 104 hours per year).

RHODE ISLAND

- **MAXIMUM USE**

  R.I. CODE R. 01 060 001-80 § 5.0623 (2001) ("Sick leave is hereby defined to mean a necessary absence from duty due to illness, injury, or exposure to contagious disease and may include absence due to illness or death in the immediate family of the employee or necessary attendance upon a member of the immediate family who is ill. Sick leave with pay for the purpose of such attendance, however, is to be used only in emergency and is limited to 10 working days within any calendar year.").

- **ACCRUAL LIMITS**

  R.I. CODE R. 01 060 001-80 § 5.062 ("Unless modified by a particular union contract, all full-time employees whether on standard 35 or 40 hour workweek or on a non-standard workweek, and part-time employees who work at least 16 hours per week or whose work schedule requires the performance of service to the state for some part of each working day of the official schedule to which the class is assigned, shall accrue .0557 hours for each hour of service during the biweekly pay period up to a maximum of assigned hours in the workweek for the position in which the employee is working.").

SOUTH CAROLINA

- **MAXIMUM USE**

  S.C. CODE. ANN. § 8-11-40 (2001) ("Employees earning sick leave as provided in Section 19-710 may not use more than eight days of sick leave annually to care for ill members of their immediate families. For purposes of this eight days of sick leave, the employee's 'immediate family' means the employee's spouse and children and the following

relations to the employee or spouse of the employee: mother, father, brother, sister, grandparent, legal guardian, and grandchildren of the grandchild resides with the employee and the employee is the primary caretaker of the grandchild.").

S.C. CODE ANN. REGS. § 19-710.04(B)(6) (2002) ("Reasons an employee shall be allowed to use sick leave are as follows: Caring for ill members of immediate family [Note: Employees earning sick leave as provided in Section 19-710 may not use more than eight days of sick leave annually to care for ill members of their immediate families. For purposes of this eight days of sick leave, the employee's 'immediate family' means the employee's spouse and children and the following relations to the employee or spouse of the employee: mother, father, brother, sister, grandparent, legal guardian, and grandchildren of the grandchild resides with the employee and the employee is the primary caretaker of the grandchild.]").

- **ACCRUAL LIMITS**

  S.C. CODE. ANN. § 8-11-40 (2001) ("All permanent full-time state employees are entitled to fifteen days sick leave a year with pay. Sick leave is earned by permanent full-time state employees at the rate of one and one-fourth days a month and may be accumulated, but no more than one hundred eighty days may be carried over from one calendar year to another.").

SOUTH DAKOTA

- **MAXIMUM USE**

  S.D. ADMIN. R. 55:01:22:02.04(2) (2002) ("An employee may use up to 40 hours of accumulated sick leave annually for the following purposes: The temporary care of members of the immediate family").

- **ACCRUAL LIMITS**

  S.D. ADMIN. R. 55:01:22:0 (2002) ("Sick leave may be accrued in equal increments on no more than 80 hours each biweekly pay period. Employees paid monthly shall accumulate sick leave at a rate of 9.334 hours per month. Employees who work less than full time shall accrue prorated sick leave based on the number of hours paid in the pay period.").

TENNESSEE

- **ACCRUAL LIMITS**

  TENN. COMP. R. & REGS. 1120-6-.12 (2002) ("Sick leave is accrued by an employee at the rate of one (1) day for each month or major fraction of a month of active service.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  TENN. CODE ANN. § 8-50-802(a)(1), (a)(3) (2001) ("Sick leave may be granted to each officer and employee who is scheduled to work one thousand six hundred (1,600) hours or more in a fiscal year, whether compensated on an hourly, daily, monthly, or piecework basis, at the rate of one (1) day for each month of service or major fraction thereof, at the discretion of the head of the department or agency and with approval of the commissioner of personnel."), ("Sick leave may only be used for absence from duty because of illness or disability due to accident of employee, the employee's exposure to contagious diseases, or because of illness or death in the immediate family of the employee for such period as the attendance of the employee shall be necessary, except hereinafter provided.").

  TENN. COMP. R. & REGS. 1120-6-.12.(1) (2002) ("An appointing authority may grant an eligible

employee sick leave for any of the following reasons: illness or death in the immediate family, or others who, at the discretion of the appointing authority, have a relationship which merits similar consideration.").

TEXAS

- ACCRUAL LIMITS

  TEX. GOV'T CODE ANN. § 661.202(c) (2002) ("Sick leave entitlement for a full-time employee accrues at the rate of eight hours for each month of state employment. A part-time employee accrues sick leave on a proportionate basis. An employee who is employed by the state during any part of a calendar month accrues sick leave entitlement for the entire calendar month. Sick leave accumulates with the unused amount of sick leave carried forward each month.").

UTAH

- ACCRUAL LIMITS

  UTAH ADMIN. CODE R. 477-8-7(4)(a) (2002) ("Employees shall accrue sick leave with pay at the rate of four hours each pay period. Sick leave shall accrue without limit.").

VIRGINIA

- ACCRUAL LIMITS

  VA. CODE ANN. 51.1-1107(A) ("On the effective date of coverage for existing employees, and thereafter on each January 10, existing participating employees shall receive an amount of family and personal leave based on the number of months of state service as an eligible employee as follows: Less than 120 months [of state service], 32 hours; 120 or more months [of state service], 40 hours.")

WASHINGTON

- ACCRUAL LIMITS

  WASH. ADMIN. CODE § 356-18-050(2)(a)-(c) (2002) ("Full-time employees shall be credited monthly with eight hours of sick leave under the following conditions: (a) The employee must be employed for fifteen calendar days or more during the month. (b) Any leave without pay taken during the month will not be counted toward the fifteen calendar day requirement. (c) Holidays for which the employee is otherwise eligible that fall within the qualifying fifteen days count toward the minimum requirement. Sick leave credit for other than full-time employees shall be computed and accrued in an amount proportionate to the time the employee is in pay status during the month to that required for full-time employment.").

WEST VIRGINIA

- MAXIMUM USE

  W. VA. CODE ST. R. § 143-1-14.4(f)(6) (2002) ("Accrued sick leave shall be granted to employees for the following reasons: Absence for illness or routine dental and medical appointments of a member of an employee's immediate family as defined in this rule, including reasonable travel time, if requested, not to exceed a total of three hours per occurrence, shall be charged to accrued sick leave, not to exceed 40 hours per calendar year").

- ACCRUAL LIMITS

  W. VA. CODE ST. R. § 143-1-14.4(a) (2002) ("Except as otherwise provided in this subdivision, each employee shall receive accrued sick leave with pay and benefits. Sick leave is computed on the basis of hours equal to 1.5 days per month for full-

time employees. Sick leave is accrued at the end of each pay period or on the last work day for separating employees. It may be prorated for employees granted a medical leave of absence or satisfying the conditions for approval of a medical leave of absence in accordance with 14.8(c) of this rule. Prorated leave is computed in the proportion to hours worked during this pay period. Sick leave cannot be accrued for hours no paid nor for hours worked beyond the normal work week which shall not exceed 40 hours. There is unlimited accumulation of sick leave.").

WISCONSIN

- **MAXIMUM USE**

  WIS. ADMIN. CODE § ER 18.03(4)(c) (2002) ("Each employee who has accrued sick leave credits shall be eligible to use sick leave for periods of absence from employment, as follows: For temporary emergency medical care of ill or injured members of the immediate family for a limited period of time to permit the employee to make other arrangements. Use of sick leave for temporary emergency care of immediate family members is limited to 5 work days for any one illness or injury; however, the use of sick leave may be extended to cover unusual circumstances provided prior approval is obtained from appointing authority.").

- **ACCRUAL LIMITS**

  WIS. ADMIN. CODE § ER 18.03(2)(a) (2002) ("Sick leave credit shall accrue at the rate of 0625 hour for each hour in pay status, not to exceed 5 hours in any biweekly pay period.").

WYOMING

- **ACCRUAL LIMITS**

  WYO. R. & REGS. ch. 10, § 2(a)(i), (iv), (d) (2002) ("Permanent and probationary employees shall accrue sick leave according to the number of hours worked in the month."), ("The following rates shall be used: 160 or more hours – 8 hours per month; 40 through 159 hours – Prorated according to formula; 39 or less hours – no accrual.").

- **EXPRESSLY SUBJECT TO DISCRETION**

  WYO. R. & REGS. ch. 10, § 2(b), (d) (2002) ("Accrued sick leave may be used during scheduled work hours when an employee is incapacitated by sickness or injury; for pregnancy, childbirth or related medical conditions; for medical, dental or optical examinations or treatment; for death or illness of a member of the employee's or the employee's spouse's immediate family and such other persons as approved by the agency head; or when an employee has been exposed to a contagious disease such that attendance at work could jeopardize the health of others."), ("The agency head shall approve the use of sick leave only after having determined that the absence was for a legitimate reason.").

(16)

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IN THE
Supreme Court of the United States

NEVADA DEPARTMENT OF
HUMAN RESOURCES, et al.,

Petitioners,

v.

WILLIAM HIBBS, et al.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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Miscellaneous

Edward F. Zigler and Meryl Frank, THE PARENTAL LEAVE CRISIS, TOWARD A NATIONAL POLICY (1988) 6

The power of Congress to address family, work, and gender issues through national policy is not at issue in this case. The only power challenged is Congress's ability to reallocate the peoples' money, collected and held by States in trust for their citizens, through the judicial power of federal courts.

Because Congress had authority under the Commerce Clause to enact the FMLA, the Act creates a valid right for public and private employees to take leave from their jobs to care for their families. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). The Commerce Clause also empowers Congress to guarantee that the family leave right is enforceable by public and private employees against their employers. Private employees and non-state public employees may seek all the retroactive and prospective remedies described in the FMLA. The FMLA leave rights of state employees may be enforced against their state employers through actions filed by the United States, actions seeking prospective injunctive relief, and actions filed against state managers in their individual capacity. Pet. Br. 4. Abrogating state immunity is not necessary for the FMLA to succeed.

While the Commerce Clause power is not broad enough to abrogate state immunity, Congress may abrogate immunity to enforce the Equal Protection Clause. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). But that power, because it fundamentally alters the constitutional balance between States and the Federal Government, may only be exercised to correct unconstitutional state conduct. *Civil Rights Cases*, 109 U.S. 3, 11-12 (1883).

The core question in this case is ***how*** the FMLA's abrogation of state immunity corrects alleged unconstitutional state conduct. Even with their immunity intact, States will remain compliant with the FMLA because their employees have a federal right to leave. In addition, state leave policies have already corrected alleged unconstitutional state conduct and also provide leave rights that

are enforceable in state courts. The presence of corrective state action, without an abrogation of state immunity by Congress, demonstrates that the FMLA's abrogation is redundant and therefore invalid.

Faithful to the purpose of Section 5 and cognizant of the Section's impact on the State-Federal balance, this Court has recognized the validity of an exercise of power under Section 5 in only two instances: Congress exercises its Section 5 power by prohibiting unconstitutional conduct directly or by banning constitutional conduct that, itself, causes a constitutional violation. The FMLA does neither. It does not prohibit the unconstitutional granting or denial of leave or ban unconstitutional gender-based leave policies. It requires employers to provide a set leave benefit. But an employer's failure to provide leave is not itself unconstitutional and does not cause an unconstitutional effect. After all, States would not violate the Constitution if they denied their employees leave under § 2612(a)(1)(C).

The Court in the *Civil Rights Cases*, while invalidating Section 5 legislation that was not remedial, aptly described this weakness of the FMLA:

> An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may

> have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.
>
> If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop.

109 U.S. at 14.

For Respondent to prevail, this Court must adopt at least four novel principles that will leave Section 5 power completely unlimited. First, the Court must characterize the FMLA as valid remedial legislation even though Congress did not investigate or make any findings related to alleged unconstitutional state conduct. To do so, however, would mark the first time this Court has upheld, as Section 5 legislation, a law that prohibits constitutional state conduct without identifying any unconstitutional conduct to justify the ban. Second, the Court must adopt a new "sliding scale" of review—unsupported by any case law—that is driven by the type of discrimination at issue. Third, it would have to embrace the unprecedented theory that constitutional state conduct may be prohibited if the conduct is based on "lingering," "underground" or "second-generation" discrimination. Fourth, the Court must uphold a substantive benefit like twelve weeks of leave without pay under the guise of Section 5. The fact that Respondent and the United States are driven to such extreme positions that deviate from settled Section 5 principles illustrates why the FMLA is not valid Section 5 legislation.

1. **Congress did not indicate in the purposes or findings of the FMLA that it intended the FMLA to combat state gender discrimination.** In passing the FMLA, Congress never purported to address unconstitutional state conduct. To be sure,

Congress found that the responsibility for family care falls more often on, and most affects the working lives of, women, concluding that this societal reality was the result of "the nature of the roles of men and women in our society." 29 U.S.C. § 2601(a)(5). Congress further found that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate," *Id.* § 2601(a)(6), and consequently provided leave benefits equally to men and women. *See* S. REP. No. 103-3 at 16; H.R. REP No. 103-8 at 29. Congress thus intended to accomplish its social policy objectives, 29 U.S.C. § 2601(b)(1)-(2), in a manner ***consistent*** with the Equal Protection Clause and intended to ***promote*** equal employment opportunities. *Id.* § 2601(b)(4)-(5).

These findings do not reflect, however, a judgment by Congress about whether these "roles," or the impact of family care responsibility on women, were the result of unconstitutional state discrimination. In stark contrast to valid Section 5 legislation, neither the Act's text nor its supporting reports mentions Section 5, an intent to ***enforce*** the Equal Protection Clause, or state discrimination. ***South Carolina v. Katzenbach***, 383 U.S. 301, 309, 337-38 (1966) (referencing text and committee reports that explicitly evidence Congress's intent).

The contrary conclusion drawn by Respondent and the United States (Resp. Br. 20-22; U.S. Br. 8-11) is simply conjecture that is not reflected in the actual terms of the FMLA's "Findings and Purposes" section. What individual ***amici*** may have thought when they were testifying about or voting on the FMLA, moreover, is irrelevant. ***See generally*** Br. ***Amici*** Senators and Representatives. Congress, when it spoke through the legislation, did not adopt the view that the FMLA was intended to combat state discrimination, and after-the-fact rationalizations cannot alter this reality.

This is not to say that the FMLA does not clearly state Congress's intent to apply the FMLA to States. Pet. Br. 9 n.2. Nor is it Nevada's contention that Congress must state with particularity the exact constitutional power it intends to exercise. But when an act of Congress is alleged to constitute a valid abrogation of state immunity, one would expect ***some*** discussion by Congress of the specific unconstitutional state conduct it intends to remedy or some textual signal from Congress that it intended to wield its coercive Section 5 power. In the FMLA, however, there is none.

One explanation for this void is that Congress believed it could abrogate state immunity through its Commerce Clause power. ***See Pennsylvania v. Union Gas Co.***, 491 U.S. 1 (1989), ***overruled by Seminole Tribe of Florida v. Florida***, 517 U.S. 44, 66 (1996). Since the overwhelming evidence indicates Congress intended to enact social policy, not Section 5 legislation, this explanation is the only plausible one. As mere social policy enacted under the Commerce Clause, the FMLA cannot validly abrogate state immunity.

2. **The legislative history of the FMLA does not reveal any unconstitutional state conduct.** In all the volumes of legislative history concerning the FMLA, Congress ***never*** held a single hearing or considered a single report focusing on alleged unconstitutional state conduct. Respondent cannot escape this conclusion by elevating isolated sentences scattered throughout the FMLA's voluminous history into proof of state misconduct. Resp. Br. 29-30. Nor can evidence concerning private sector discrimination fill this gap. This Court has repeatedly recognized—but Respondent and the United States ignore—that the public sector and private sector simply are not equivalent. ***Bd. of Tr. of the Univ. of Ala. v. Garrett***, 531 U.S. 356, 375 (2001) (Kennedy, J., and O'Connor, J., concurring). Indeed, most public employees accept less pay than their private colleagues because government jobs give ***more*** leave.

The Yale Bush study, relied upon so heavily by the Ninth Circuit and Respondent (Pet. App. 20a; Resp. Br. 29-30) is equally unavailing. The study was not commissioned to investigate state constitutional violations. When the study discussed the States' role in leave policy, it turned to the Governor of New Jersey for input. The study did not even imply constitutional issues were involved in the leave crisis. Edward F. Zigler and Meryl Frank, THE PARENTAL LEAVE CRISIS, TOWARD A NATIONAL POLICY 333-40 (1988). As with the ADA and ADEA, Congress simply failed to focus on state conduct, not to mention identify widespread and persistent constitutional violations.

3. **This Court should not hold Congress to some lower standard for identifying unconstitutional state conduct**. Implicitly acknowledging that the family leave provision of the FMLA would fail under this Court's analysis in *Garrett* and *Kimel*, the Respondent advocates applying a new standard. Resp. Br. 15. According to him, so long as this Court can perceive *any* basis to conclude, even though Congress itself did not, that States persistently and pervasively violate their citizens' constitutional rights, it should uphold the FMLA.

Under this rule, the Court must engage in the type of investigation Congress typically completes before it enforces the Equal Protection Clause. Such a practice, however, flies in the face of the usual assignment of constitutional duties. Congress should identify the pattern of unconstitutional state conduct it intends to correct with Section 5 legislation, because "it is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws." *Garrett*, 531 U.S. at 375 (Kennedy, J., and O'Connor, J., concurring); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89-91 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997); *see Oregon v. Mitchell*, 400 U.S. 112, 130 (1970) (Black, J.). Given the unique nature of Section 5 power and its

requisite encroachment on state power, this Court tends to require Congress at least to identify its reasons for exercising Section 5 power. *See Ex parte Virginia*, 100 U.S. 339, 346-48 (1880) (Section 5 is "carved out" of retained state powers). An exhaustive review of history is not required, only some suggestion that the existing state practice requires a Section 5 remedy. The dignity that States maintain as an attribute of their sovereignty merits no less. *Alden v. Maine*, 527 U.S. 706, 715 (1999).

Even when Section 5 legislation involves discrimination that receives heightened review, this Court has required Congress to identify existing unconstitutional state conduct. In the Voting Rights Act cases, for example, the Court reviewed the state conduct Congress identified as unconstitutional in order to judge the propriety of the Act. *South Carolina v. Katzenbach*, 383 U.S. at 308-309, 315; *Oregon v. Mitchell*, 400 U.S. at 132 (Opinion of Black, J.). Despite the judicially documented history of racial discrimination in America, moreover, Congress exhaustively detailed the exact type of unconstitutional conduct it sought to correct. *South Carolina v. Katzenbach*, 383 U.S. at 308-09. Similarly, in *City of Boerne*, the Court sifted through Congress's record in search of unconstitutional state conduct when it reviewed legislation that protected the free exercise of religion—a fundamental right. *City of Boerne*, 521 U.S. at 530-32. Even though discrimination based on a fundamental right merits heightened scrutiny, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966), a review of the congressional record was critical to the *City of Boerne's* Section 5 review. In *Morrison*, a Section 5 case involving gender discrimination, this Court also reviewed congressional conclusions about discrimination. *United States v. Morrison*, 529 U.S. 598, 619-20 (2000). Thus, in all of this Court's Section 5 jurisprudence, Congress has been held to the same standard

regardless of the nature of the unconstitutional conduct it intended to remedy.

No one—not Respondent, his *Amici*, or the United States—can point to a single case in which legislation was held to validly prohibit constitutional state action without any indication from Congress of its Section 5 ends. *Fitzpatrick* is not to the contrary. The reason a showing of unconstitutional state conduct was not required in *Fitzpatrick* is that each money damages lawsuit authorized by the statute at issue ***necessarily*** involved a violation of the Constitution. *Fitzpatrick v. Bitzer*, 427 U.S. at 447, 456 n.11. A sovereign that violates the constitutional rights of a citizen can hardly expect to retain its immunity, and the Fourteenth Amendment stands for as much. *South Carolina v. Katzenbach*, 383 U.S. at 325 (citations omitted).

4. Presuming that States engage in pervasive and widespread violations of the Constitution is contrary to the deference and respect owed to States under our system of dual sovereignty. The respect due States as sovereigns mandates the presumption that state conduct is consistent with the Constitution unless proven otherwise. States are politically accountable to their citizens, and state officials "are bound by obligations imposed by the Constitution." *Alden*, 527 U.S. at 755. In Eleventh Amendment cases, courts should be "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States." *Id.*

Following the Ninth Circuit, Respondent and the United States rely heavily on the history of repealed state laws to conclude that States currently engage in pervasive unconstitutional gender discrimination. Since the repealed laws alone can hardly justify the FMLA as valid Section 5 legislation, *Garrett*, 531 U.S. at 369 n.6, they ask the Court to presume, based on this history, that States still hold to outdated notions about women and make

widespread gender-based employment decisions. Resp. Br. 26-28; U.S. Br. 12.

Nevada does not contest that application of heightened scrutiny in gender cases "responds to volumes of history" that includes repealed gender-based state laws. *United States v. Virginia*, 518 U.S. 515, 531 (1996). But that history, without more, has never been sufficient to presume that a State's conduct is unconstitutional. Rather, in light of that history, courts can presume unconstitutional conduct when the State *classifies* individuals based on their gender. *Id.* Requiring a State to present a persuasive justification for a particular gender classification in light of its history—which, incidentally, no one claims is occurring here—is a far cry from presuming that States engage in a widespread pattern of gender discrimination against their employees because of their historical, outdated laws.

South Carolina v. Katzenbach is not contrary. In that case, Congress did not simply rely on the history of racial discrimination to conclude that States engage in widespread discrimination. Congress determined that the then-existing state literacy tests were intended to perpetuate the disenfranchisement of minority voters. *South Carolina v. Katzenbach*, 383 U.S. at 333. In *City of Rome*, the Court ruled that literacy tests in jurisdictions with a history of purposeful discrimination through the use of such tests could be prohibited. *City of Rome v. United States*, 446 U.S. 156, 177 (1980). By contrast, here, the FMLA does not ban the States' repackaging of old, discriminatory laws. Current state laws bear no resemblance to those of the past. Rather, they resemble the FMLA itself. Thus, unlike the "unremitting and ingenious defiance" of States in *South Carolina v. Katzenbach*, 383 U.S. at 309, here States have been progressive.

If this Court were to use solely our Nation's "long and unfortunate history of sex discrimination" to justify a Section 5 response, States would never be credited for their reforms. No

state action could erase the stigma of the past. State managers, male or female, would be presumed to act with the purposeful intent to discriminate based on gender when making discretionary employment decisions.

This is exactly the view of Respondent and the United States. Each alleges, based mainly on the existence of repealed laws, that current state decision makers still adhere to outdated notions about the role of women. Resp. Br. 33; U.S. Br. 34-35, 39-40. These unsupported assertions are an affront to States and are entirely insufficient to indict sovereigns with the animus of discrimination.

Indeed, if Respondent were correct and the mere specter of past discrimination justified the abrogation of state immunity regardless of current state practices, all current gender-neutral state laws would be presumed unconstitutional. States would have to prove an absence of discrimination in order to protect their immunity, a much more difficult task than proving a particular gender-based classification is substantially related to the achievement of an important state interest. Stripped of its intended limitations, Fourteenth Amendment power would obliterate the "Framer's carefully crafted balance of power between the States and National Government." *Morrison*, 529 U.S. at 620.

5. Equally troubling is Respondent's request that the Court peruse the "public record" for any state action that may justify the FMLA family leave provision. Resort to the "public record" is unprecedented and ill-advised. While precedent may not bar such a search, forcing this Court to conduct the type of exhaustive analysis Congress should undertake when it enacts legislation is simply impractical and inconsistent with this Court's role as a reviewer of legislation, not a policy maker. Given the significant impact of divesting state immunity involuntarily, it is hardly burdensome to expect Congress, after investigating family leave issues for eight years and considering thousands of pages of testimony, to identify the state conduct it seeks to correct. This Court should not now do Congress's job.

6. The fact that family leave duties fall disproportionately on women is insufficient to demonstrate unconstitutional conduct. Respondent, his *Amici*, and the United States claim that the FMLA must address unconstitutional conduct because family care falls disproportionately on women. But they fail to point to any proof that States *intentionally* design family leave policies to cause this disparate impact, as they must in order to demonstrate a constitutional violation. ***Washington v. Davis***, 426 U.S. 229, 242 (1976). In other words, disproportionate gender impact alone does not trigger heightened scrutiny. *Id.*; ***see also Personnel Adm'r v. Feeney***, 442 U.S. 256, 274-76 (1979). In the absence of gender-based family leave classifications or intentional discrimination, state conduct is presumed to be constitutional.

7. The alleged "lingering effects" of past discrimination and "hidden" discrimination do not amount to unconstitutional state conduct sufficient to justify an exercise of Section 5 power. Lacking any argument that the family leave provision of the FMLA addresses unconstitutional conduct, Respondent and the United States assert that the FMLA addresses the "lingering effects" of past discrimination (that is, stereotypes about men and women) and secret discrimination.

To the extent the FMLA is intended to address the lingering effects of repealed state laws on the private sector, it is not an appropriate Section 5 remedy because it is not directed at the acts of state officials. *Morrison*, 529 U.S. at 626. Indeed, this Court has never recognized that a stereotype, even those held by state employees, violates the Constitution. So long as stereotypes are not the basis for state conduct, they are merely private (albeit offensive) beliefs.

Respondent and the United States have no evidence that States hold, or act upon, stereotypical beliefs about men and women. They merely assert that state employers must be using gender-neutral policies to discriminate against women because "old habits die hard." Resp. Br. 28; U.S. Br. 34-35. In addition, Respondent attempts to rely (Resp. Br. 28 & n.12) on public opinion polls to impute to state employers the belief that "a woman's place is in the home." These arguments ignore, however, that States "stand apart from the citizenry"; they should not "be held in violation of the Constitution on the assumption they embody the misconceived or malicious perceptions of some of their citizens." *Garrett*, 531 U.S. at 375 (Kennedy, J., and O'Connor, J., concurring).

The United States further asserts that unconstitutional state conduct has gone "underground" and that the cause of this lack of evidence is discrimination itself. U.S. Br. 34-36. The

assertion that unconstitutional conduct is "underground" is simply another way of saying there is no evidence of such conduct. Such assertions have never been sufficient to justify abrogating state immunity.

Nor should they be. States maintain the dignity of a co-equal in our system of dual sovereignty, and immunity is central to that dignity. *Alden*, 527 U.S. at 715. Without it, the Constitution would not have been ratified. The Civil War Amendments altered this federalism balance by authorizing Congress, "only when certain specific conditions are met," to strip a State of its immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-39 (1985). Those conditions are not met with speculation about "hidden" actions. Holding otherwise would impermissibly allow Section 5 to "work an entire change to our form of government," *City of Boerne*, 521 U.S. at 521 (quoting Nevada Senator William Stewart), instead of merely allowing Congress to enforce the Equal Protection Clause.

For this reason, States tend to uniformly assert their immunity in FMLA actions. Before the Court granted *certiorari* in this case, both New York and Connecticut successfully argued that the FMLA's family leave provision does not validly abrogate state immunity—the reverse of their position here. *Compare Serafin v. Conn. Dep't of Mental Health & Addiction Services*, 118 F. Supp. 2d 274 (D. Conn. 2000); *McGregor v. Goord*, 18 F. Supp. 2d 204 (N.D.N.Y. 1998); *McGregor v. Goord*, 691 N.Y.S.2d 875 (N.Y. Sup. Ct. 1999) *with* Br. of New York. *See also Hale v. Mann*, 219 F.3d 61, 66 (2d Cir. 2000) (observing that New York asserted immunity to defend against action under FMLA's personal leave provision).

8. References to maternity and paternity leave policies are irrelevant. *Certiorari* was granted in this case to review the FMLA's family leave provision, § 2612(a)(1)(C), not the parenting leave provisions, §§ 2612(a)(1)(A)-(B). Save one

footnote, Respondent confuses family leave with parenting leave. Resp. Br. 25 n.11. Reference to state maternity or paternity leave policies is of little aid here because even if state unconstitutional discrimination in maternity and paternity leave were shown, such transgressions would justify only the FMLA's parenting leave policies. ***See South Carolina v. Katzenbach***, 383 U.S. at 329-36 (reviewing validity of Voting Rights Act on a provision-by-provision basis).

Indeed, Respondent's attempt to use maternity leave policies to justify family leave is inconsistent with the United States' historical treatment of the FMLA's leave provisions as independent and requiring separate justification. ***See*** Lodging by United States filed May 20, 2002 (Letters from Solicitor General Theodore B. Olson to the House and Senate) (conceding that personal leave provision is unconstitutional despite maternity leave provisions); ***but see*** Pet. Br. App. C (United States explaining to Congress that the FMLA would violate Eleventh Amendment).

Even if maternity policies were relevant, their scarcity among States would fail to show a pattern of unconstitutional state conduct. In addition, no court has found discretionary or gender-based maternity leave policies to be ***per se*** unconstitutional. While leave granted to one gender may be subject to heightened scrutiny, this Court indicated in *California Federal Saving & Loan Association v. Guerra*, 479 U.S. 272, 291 (1987), that a pregnancy leave policy may withstand constitutional scrutiny. As even Respondent acknowledges (Resp. Br. 30), leave taken after the first 4-8 weeks of childbirth is usually related to the effects of pregnancy—a gender-specific effect. Accordingly, state maternity leave policies that allow only women to take 4-8 weeks leave after childbirth may be constitutional. In any event, Respondent's characterization of current family leave policies and collective bargaining agreements is incorrect; the institutions

Respondent cites (Resp. Br. 31 n.19, 32 n.20), have recently adopted FMLA-like benefits. Reply App. A and B.

9. Isolated lawsuits involving States are also not proof of a pattern of unconstitutional discrimination. Pointing to a series of cases, ***none*** of which involves Nevada, Respondent attempts to find a pattern of state constitutional violations. Resp. Br. 35 n.23. Many of the cases involve the Federal Government and private entities. Others involve local governments, consideration of which "make[s] no sense" in Section 5 analysis. *Garrett*, 531 U.S. at 369. The few remaining cases that involve state actors "fall far short of even suggesting [a] pattern" of state conduct that can justify Section 5 legislation. *Id.* at 370.

10. Whenever Congress uses Section 5 to prohibit constitutional state activity and abrogate Eleventh Amendment immunity, its means must be congruent and proportional to the unconstitutional conduct it seeks to correct. Even when Congress reasonably concludes a measure will combat discrimination, it is incumbent on the Court to review whether the measure overshoots the mark. Misuse of Section 5 power, after all, alters the guarantees of the Equal Protection Clause and infringes on state sovereignty.

Urging a sharp break from Section 5 precedent, Respondent and the United States advocate a sliding scale congruence and proportionality test that is driven by the type of right Congress is enforcing. Indeed, Respondent and his ***Amici*** seek to limit the test used in *City of Boerne*, *Kimel*, and *Garrett*, arguing that Congress may legislate with little or no limitation when a right is entitled to heightened protection under the Constitution. This misses the point of the congruence and proportionality test entirely. Section 5 "is a limited authority," that extends "only to a single class of cases," and the requirement of congruence and proportionality guarantees the power is used within its limits. *Ex parte Virginia*, 100 U.S. at 348.

For this reason, this Court has required that Congress exercise its Section 5 power congruently and proportionally even when seeking to remedy racial discrimination. For example, in *South Carolina v. Katzenbach*, 383 U.S. at 308, the Court upheld Section 5 legislation only after it thoroughly evaluated the nature of the state action which violated the Constitution and Congress's means to redress the state action. *Id.* at 328, 331. Similarly, when Congress used Section 5 to remedy alleged violations of freedom of expression, a right subject to heightened constitutional protection, the Court reviewed whether the remedy was congruent and proportional to alleged state violations. *City of Boerne*, 521 U.S. at 530. In *City of Boerne*, the Court, indeed, derived its analysis from the Voting Rights Act decisions, *id.* at 533, and the *Civil Rights Cases*, which established that the judiciary should exercise its "responsibility of an independent judgment," and ascertain the ultimate appropriateness of Congress's exercise of Section 5 power, no matter the right involved. *Civil Rights Cases*, 109 U.S. at 10. Thus, *City of Boerne* accurately articulated the method of review that is constitutionally required whenever Congress exercises Section 5 power.

11. Uncritical deference to Congress's selection of its Section 5 means in this case would turn Section 5 into an unlimited power. Upholding the FMLA's abrogation of immunity despite the lack of congruence between the FMLA and unconstitutional state conduct would transform the *City of Boerne* test to a statistical determination. As long as statistics show some disproportionate societal burden on women, Congress could abrogate state sovereign immunity through any legislation that has a potential to reverse that statistical disparity, even if the States had already taken steps to eliminate the impact. Under this approach, it would be difficult to see where Section 5 authority "is to stop." *Civil Rights Cases*, 109 U.S. at 14. For example, because child care falls disproportionately on women,

under Respondent's logic, Congress might mandate that the work and school day end at the same time, that employers provide a stipend for child care, or that all employees receive a 30-minute daily "child-care" break. One can hardly contend, however, that such requirements address a constitutional concern.

12. The FMLA's abrogation of state immunity is not congruent and proportional because existing laws are sufficient to correct any alleged pattern of unconstitutional state conduct. The Commerce Clause assures that States will comply with the FMLA or be subject to enforcement actions by the United States, § 1983 actions, or *Ex parte Young* actions. States, moreover, are adhering to the FMLA's mandate. Reply App. C. Even Respondent acknowledges that Nevada posts FMLA posters and teaches FMLA seminars to its employees. Pet. App. 7a. State gender-neutral leave policies also assure that States do not unconstitutionally discriminate based on gender.

Given the effectiveness of other measures to correct any minimal state misconduct, Congress overstepped its bounds by abrogating state immunity in the FMLA. Indeed, Congress never concluded that direct constitutional challenges to state employment policies, or Title VII and Pregnancy Discrimination Act actions, were insufficient to enforce the Equal Protection Clause. *Compare South Carolina v. Katzenbach*, 383 U.S. at 328 (remarking that Congress found case-by-case enforcement inadequate). Congress did not consider that state statutes prohibit discrimination in nearly every State. Reply App. C. It ignored, moreover, that § 1983 is effective to remedy isolated occurrences of gender discrimination. *See Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001). In this way, the FMLA is further distinguishable from the Voting Rights Act, which was passed after Congress concluded that traditional measures were failing. Accordingly, the threat of a money judgment is not necessary to achieve compliance with the FMLA, as Nevada's experience attests.

That money damages awards under the FMLA may be limited is irrelevant. *Seminole*, 517 U.S. at 58. The Eleventh Amendment does not exist solely to prevent large money judgments; it also avoids "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The relatively meritless claim Respondent filed demonstrates the danger of unlimited Section 5 power. U.S. Br. 4 n.2.

13. The twelve-week leave provision is not congruent or proportional. The FMLA award of a substantive benefit of twelve weeks of leave is unlike any Section 5 prohibition this Court has upheld. Congress could have provided far less, moreover, to prevent alleged discrimination. It could have prohibited gender-specific or discretionary leave or required that leave policies include the right of job protection and extend for a reasonable period of leave. By drawing the line at twelve weeks for child development purposes, Congress clearly abandoned corrective goals and adopted social policy. *Civil Rights Cases*, 109 U.S. at 11-13, 19.

14. Congress could not properly abrogate state immunity without investigating the corrective power of state family leave policies. Even if, as Respondent claims, the family leave provision remedies unconstitutional state conduct, state family leave policies accomplish the same goal. Nothing is magic about whether a policy is federal or state. In States, like Nevada, that adopted the FMLA's twelve week gender-neutral family leave policy, state policy is as corrective as the FMLA. In fact, Nevada's policies are superior to the FMLA because they also provide paid family leave through accrued sick leave and catastrophic leave programs. That state policies may be repealed does not discount their value. States should be presumed to act constitutionally, without the will to repeal laws that strengthen constitutional principles. *Alden*, 527 U.S. at 755.

This case demonstrates Nevada's more generous leave. Respondent spent over 900 hours away from work in 1997, R. Doc. D. Nev., Nev.'s Summ J. Mot. at Exhibit N. Nevada never disputed that Respondent was entitled to leave, only that he needed to return to work after exhausting his leave. While Respondent still debates his notice argument, a point even the United States admits is without merit (U.S. Br. 4 n.2), he cannot dispute that Nevada's leave policies provided him with ample leave to care for his family.

Even more remarkable is California's example. In 2002, California adopted a *paid* family leave program that guarantees twelve weeks of family leave, six of which must be paid. S.B. 1661, 2001-2002 Leg. (Ca. 2002). The extraordinary step of subjecting California to money damages for engaging in *constitutional* conduct cannot be remedial. In States like Nevada and California that have voluntarily adopted generous family leave policies, the abrogation of immunity in the FMLA remedies nothing.

Numerous other States have family leave policies that are gender-neutral, include job protection and correct the same state conduct the FMLA was designed to remedy. Today at least 38 States are in this category. Reply App. C. The length of leave provided in those policies should not govern whether the FMLA applies, as Congress did not decide on the twelve week benefit based on constitutional requirements. Since the FMLA is not a congruent and proportional remedy to these States' conduct, the FMLA's general abrogation of state immunity is not valid.

Congress should have included a provision exempting States that voluntarily adopt equivalent leave benefits. The goal of the FMLA as Section 5 legislation must be to correct state action, not to punish the States. *Civil Rights Cases*, 109 U.S. at 11-12. If a State voluntarily corrects its action, the remedial function of the FMLA disappears. It should not matter whether the

corrective action is State-developed or if it is adopted after the FMLA. Once the state misconduct is corrected, Section 5 legislation is no longer valid.

Congress was aware that state family leave programs had been enacted or were being debated by state governments across America. Even so, it did not investigate whether state policies had fully, or in part, corrected any asserted discrimination. Congress could have directed the United States Department of Labor to monitor whether state benefit plans are as generous as the FMLA. *See South Carolina v. Katzenbach*, 383 U.S. at 352 (listing VRA provision providing termination of VRA based on Attorney General review). If Congress had, the States' adoption of leave policies, as well as state FMLA policies, would cause nearly every State in the Union to be excluded from the FMLA's coverage. Reply App. C.

Instead, Congress applied the FMLA to every State, not based on a deliberate review of individual state conduct, but to adopt a national labor standard. In this respect, the FMLA "applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment." *Civil Rights Case*, 109 U.S. at 14. Yet since Congress had no basis to conclude a broad prophylactic remedy was necessary, *Kimel*, 528 U.S. at 91, it painted with too broad a brush, and the FMLA's abrogation of immunity cannot be valid. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647 (1999).

CONCLUSION

For the reasons stated above, this Court should reverse.

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APPENDIX A

Excepts from University Leave Policies

UNIVERSITY OF COLORADO

Introduction

The University of Colorado recognizes that its faculty and staff strive to balance their work and personal lives. This Family and Medical Leave Policy ("Policy"), applicable to faculty and unclassified staff ("staff"), is designed to support these efforts and to meet the provisions of the Family and Medical Leave Act of 1993 ("FMLA"). Generally, the FMLA requires employers to provide up to 12 weeks of unpaid leave during a 12-month period for certain family and medical reasons.

The provisions of this Policy are intended to be consistent with the FMLA implementing regulations. These regulations, issued by the Wage and Hour Division of the Department of Labor at 29 CFR Part 825, should be consulted for clarification and amplification. This Policy is not intended to conflict with University obligations under the Americans with Disabilities Act of 1990 ("ADA").

* * *

Statement of Policy

A. ***Family and Medical Leave Entitlement***. Consistent with the provisions of this Policy, eligible faculty and staff are entitled to a total of 12 work weeks of unpaid Family and Medical Leave during a rolling 12-month period, measured backward from the date a faculty/staff member uses any Family and Medical Leave* if leave is requested for any one or more of the following reasons:

— the birth of the faculty or staff member's son or daughter, and to care for the newborn child. (Leave must be completed within 12 months of the date of birth.);

— the placement with the faculty or staff member of a son or daughter for adoption or foster care and to care for the newly placed child. (Leave must be completed within 12 months of the date of placement.);

— to care for the faculty or staff member's spouse, son, daughter, or parent with a serious health condition; and

— because of a serious health condition that makes the faculty or staff member unable to perform one or more of the essential functions of his/her position.

* * *

* For example, if an individual used four weeks beginning February 1, 1994, four weeks beginning June 1, 1994, and four weeks beginning December 1, 1994, he/she would not be entitled to any additional leave until February 1, 1995. Beginning on February 1, 1995, he/she would be entitled to four weeks of leave. On June 1, he/she would be entitled to an additional four weeks.

* * *

AUBURN UNIVERSITY

C. FMLA/DISABILITY-RELATED LEAVE

1. WITHOUT PAY (FMLA)

Full-time faculty members on nine-month and 12-month appointments may be eligible for certain benefits under the Family Medical Leave Act (FMLA). A summary of FMLA benefits follows. A complete statement of the policy and benefits provided is available from University Personnel Services. Employees should review the entire policy prior to exercising benefits. These benefits include the right to take leave without pay for a period of up to 12 work weeks a year for any one or a combination of the following reasons:

1. The birth or adoption of a child, or the placement in the home of a child for foster care;

2. To care for a family member (child, spouse or parent) who has a serious health condition; or

3. A serious health condition that renders the employee unable to perform his or her functions.

FMLA is intended to allow employees to balance their work and family life. Parental provisions of FMLA leave apply equally to men and women. FMLA leave itself is unpaid, but employees may choose to use accrued annual leave and remain on the payroll.

Employees must take accrued sick leave during the FMLA period provided that the reasons for the leave are covered under the University Sick Leave Policy.

Faculty are eligible if they have been employed with the University for at least 12 months and have been appointed for at least two-thirds time during the 12-month period prior to the date the FMLA leave would begin.

Leave without pay taken for the reasons listed above need not count toward promotion and/or tenure. For further clarification of this policy, see Chapter 3, Section 10.

Application for leave without pay should be initiated with the faculty member's departmental supervisor. Information concerning determination of "family member" may be obtained from University Personnel Services. Every effort will be made to accommodate the needs of a faculty member. For determination of how other benefit programs may or may not apply during periods of leave without pay, the faculty member should consult with the Office of Payroll and Employee Benefits.

* * *

UNIVERSITY OF ARKANSAS, FORT SMITH (FORMERLY WESTARK [ARKANSAS] COMMUNITY COLLEGE)

FAMILY AND MEDICAL LEAVE

The Family and Medical Leave Act of 1993 (FMLA) was enacted on February 5, 1993, and became effective on August 5, 1993. The U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division, administers and enforces FMLA for all private, state and local government employees, and some federal employees.

FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave each year for specified family and medical reasons. The law, as it currently stands, does not require UA Fort Smith—as a public university—to offer family medical leave. However, as an institution, we endorse the concept of family medical leave and have voluntarily adopted a family medical leave policy comparable to that provided by the Act. UA Fort Smith's family medical leave policy is administered in accordance with guidelines established by the Arkansas Human Resources Management System.

The law contains provisions on employer coverage; employee eligibility for the law's benefits; entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; notice and certification of the need for FMLA leave; and, protections for employees who request or take FMLA leave. The law also requires employers to keep certain records.

* * *

LEAVE ENTITLEMENT

A covered employer must grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period for one or more of the following reasons:

- For the birth and care of the newborn child of the employee;
- For placement with the employee of a son or daughter for adoption or foster care;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- To take medical leave when the employee is unable to work because of a serious health condition.

APPENDIX B

Excerpts from College Collective Bargaining Agreement

ORANGE COAST COMMUNITY COLLEGE

Section 4. Family and Medical Leave.

(a) Employees who have been continuously employed for twelve (12) months and working for 1,250 hours are eligible under Federal and State laws for Family and Medical Leave. Leaves shall be granted for up to twelve (12) weeks in a one (1) year period. Leaves must be granted in accordance with time periods applicable to State and Federal law.

(b) Unpaid leave is permitted for the following reasons: to care for the employee's newborn child or a child placed with the employee for adoption or foster care (State and Federal law run concurrently for twelve (12) week period allowed for care of newborn, adopted, or foster child); to care for the employee's spouse, son, daughter or parent who has a serious health condition including pregnancy; or, for a serious health condition that affects the working conditions of the employee. Leave does not constitute a break in service for purposes of longevity, vacation and/or sick leave, or under any other Articles of this Agreement. Leave provided may be taken in one (1) or more periods as provided by law. Upon return from Family and Medical Leave, the Faculty Member shall return to the same or equivalent position with the District, including contract pay (base salary plus, and if applicable, overload), benefits, and other employment terms and conditions. The Faculty Member shall provide thirty (30) days advance notice of the need for Leave except in the case of an emergency.

(c) The employee and dependent benefit coverage as provided under the Agreement shall continue as if the employee were actively at work. The District and the employee shall pay their respective portion of the premiums of the insurance benefit program during the Leave. The District Benefits Office shall inform the employee of its interpretation of the leave for which the person is eligible in

advance of the person taking leave. Notwithstanding any provision(s) of this Section, the employee shall be entitled to the most beneficial provision of State and/or Federal law.

Section 5. Professional Research, Study and/or Travel.

The District may grant Faculty Members unpaid leaves of absence for professional research, study, and/or travel. Such leave shall be approved in one (1) semester/six (6) calendar month periods. The District may grant an extension of such leave for one additional year.

State Statutes and Regulations Regarding State Employee Leave

State	Paid Sick Leave	Catastrophic or Sick Leave Bank	Family Medical Leave Without Pay (Non-discretionary)	Discretionary Leave Without Pay	Gender Discrimination
Alabama	Ala. Admin. Code 670-X-14-.01(1)(b)	Ala. Admin. Code 670-X-14-.04 Ala. Code § 36-26-36.2	None	Ala. Admin. Code 670-X-15-.03	Ala. Code § 29-4-3 Ala. Code § 11-43A-107
Alaska	Alaska Stat. § 39.20.305 2 Alaska Admin. Code 08.050	Alaska Stat. § 39.20.245(b) 2 Alaska Admin. Code 08.070	Alaska Stat. § 39.20.305	2 Alaska Admin. Code 08.095	Alaska Stat. § 18.80.220(a)(1)
Arizona	A.A.C. R2-5-404	A.A.C. R2-5-403(E)	A.A.C. R2-5-412	A.A.C. R2-5-414	A.R.S. 41-1463
Arkansas	A.C.A. § 21-4-206	A.C.A. § 21-4-214	None	A.C.A. § 21-4-210	A.C.A. § 16-123-105
California	2 CCR 599.745 2 CCR 599.745.1	2 CCR 599.925 2 CCR 599.913	Cal. Gov't Code § 12945.2	2 CCR 599.781 2 CCR 599.785	Cal. Gov't Code § 12940
Colorado	4 CCR 801 P-5-5	C.R.S.A. § 24-50-104(7)(c)	4 CCR 801 P-5-24 thru 35	4 CCR 801 P-5-23	C.R.S.A. § 24-34-402
Connecticut	Conn. Gen. Stat. § 5-247 Regs., Conn. State Agencies § 5-247-4	None	Conn. Gen. Stat. § 5-248a	Conn. Gen. Stat. § 5-248c Regs., Conn. State Agencies § 5-248-2	Conn. Gen. Stat. § 46a-60
Delaware	CDR 10-450-002 § 6.0310	29 Del. C. § 5956	CDR 10-450-002 § 2.000	CDR 10-450-002 § 6.0440	19 Del. C. § 711
Florida	Fla. Admin. Code Ann. r. 60K-5.030(2)(b)(3)	Fla. Stat. § 110.121	Fla. Stat. § 110.221	Fla. Admin. Code Ann. r. 60L-34-004	Fla. Stat. § 760.10
Georgia	Ga. Comp. R. & Regs. r. 478-1-.18.303	Ga. Comp. R. & Regs. r. 478-1-.30	None	Ga. Comp. R. & Regs. r. 478-1-.18.305.3	O.C.G.A. § 34-5-3
Hawaii	HRS § 79-32 (Repealed 2001, now covered by collective bargaining or executive order.	HRS § 78-26 Hi. ADC § 14-8.1	None	Hi. ADC § 14-8.1 to 14-8.20 (Repealed 2001)	HRS § 378-2
Idaho	IDAPA 15.04.01.240.03	None	IDAPA 15.04.01.242	IDAPA 15.04.01.250	Idaho Code § 67-5901
Illinois	80 Ill. Adm. Code 420.610	80 Ill. Adm. Code 303.112	80 Ill. Adm. Code 303.148	80 Ill. Adm. Code 420.640	775 ILCS 5/1-103

State	Paid Sick Leave	Catastrophic or Sick Leave Bank
Indiana	31 IAC 1-9-4	None
Iowa	IA ADC 581-14.3(19A)	IA ADC 581-14.19(19A)
Kansas	K.A.R. § 1-9-5	K.A.R. § 1-9-23
Kentucky	101 KAR 2:102 101 KAR 3:015	780 KAR 3:075
Louisiana	None	La. R.S. 42:443 Civil Service Rule 11.34 http://dscs.state.la.us
Maine	CMR 18-389-011	None
Maryland	Md. Ann. Code art. 49B, § 16	Md. State Pers. & Pen. § 9-604
Massachusetts	Mass. Rules Governing Leave § 4.07 http://www.state.ma.us/hrd/redbook.0400.htm	Mass. Ann. Laws ch. 151B, § 4
Michigan	Civil Service Rule 5-10(3)(B) http://www.michigan.gov	Civil Service Rule 5-10(A)(9)
Minnesota	Minn. Stat. § 181.9413	Minn. Stat. § 43A.1815
Mississippi	Miss. Code Ann. § 25-3-95(2)	Code Miss. R. 46-000-001 § 7.22.3b
Missouri	1 Mo. Code Regs. 20-5.020(2)(K)	1 Mo. Code Regs. 20-5.025

Family Medical Leave Without Pay (Non-discretionary)	Discretionary Leave Without Pay	Gender Discrimination
None	31 IAC 1-9-8	Burns Ind. Code Ann. § 22-9-1-2
581 IAC 14.4(19A)	581 IAC 14.5(19A)	Iowa Code § 216.6
K.A.R. § 1-9-27	K.A.R. § 1-9-6	K.S.A. § 19-4319
101 KAR 3:015 § 3	101 KAR 2:102 101 KAR. 3:015 § 2(3)	KRS § 344.040
Civil Service Rule 11.9(b)(2)	Civil Service Rules 11.27	La. R.S. 23:332
26 M.R.S.A. § 844	CMR 18-389-011	5 M.R.S. § 4572
COMAR 17.04.11.24	COMAR 17.02.11.24	Md. Ann. Code art. 49B, § 16
Mass. Rules Governing Leave § 5.02	M.G.L.A. 31 § 37 Mass. Rules § 8.10	M.G.L.A. 151B § 4
Civil Service Rule 2-12 r 2.03, Standard E	Civil Service Rule 2-12 r 2.03, Standard D	MCL § 37.2202
Probably Minnesota Civil Service Rules **	Probably Minnesota Civil Service Rules **	Minn. Stat. § 363.03
Code of Mississippi Rules 46-000-026	Miss. Code Ann. § 25-3-93(2)	Miss. Code Ann. § 25-9-103
1 Mo. Code Regs. § 20-5.020(7)(B)	1 Mo. Code Regs. § 20-5.020(7)	Mo. Ann. Stat. § 213.055

State	Paid Sick Leave	Catastrophic or Sick Leave Bank
Montana	Mont. Admin. R. 2.21.132(h)	Mont. Admin. R. 2.21.802
Nebraska	273 NAC Ch. 9, § 00501D	93 NAC Ch. 9, § 3-9.012
Nevada	NAC 284.558	Nev. Rev. Stat. § 284.3621
New Hampshire	N.H. Code Admin. R. Per. 1204.05(c)	None
New Jersey	N.J. Admin. Code tit. 4A, § 6-1.3	N.J. Admin. Code tit. 4A, § 6-1.22
New Mexico	N.M. Admin. Code § 1.7.7.10(D)	N.M. Admin. Code § 1.7.7.9
New York	N.Y. Comp. Codes R. & Regs. tit. 4, § 21.3(f)	N.Y. Comp. Codes R. & Regs. Tit. 4, § 28-3.7
North Carolina	N.C. Admin. Code tit. 25, r. 1E.0305(4)	N.C. Admin. Code tit. 25, r. 1E.1301
North Dakota	N.D. Admin. Code § 4-07-13-07	None
Ohio	Ohio Admin. Code § 123:1-32-05(A)(5)	Ohio Admin. Code § 123:1-46-05
Oklahoma	Okla. Stat. tit. 74, § 840-2.22	Okla. Stat. tit. 74, § 840-2.23
Oregon	Or. State Policy, Dept. of Admin. Services, § 60.000.01 http://www.hr.das.state.or.us/hrsd/policy/rules.htm	None

Family Medical Leave Without Pay (Non-discretionary)	Discretionary Leave Without Pay	Gender Discrimination
None	Mont. Admin. R. 2.21.704	Mont. Code Ann. §§ 49-2-303, 49-2-308
273 NAC Ch. 9 § 015.02C	273 NAC Ch. 9 § 011	277 NAC Ch. 1 § 003
NAC 284.5234, 284.5811	Nev. Rev. Stat. § 284.360	Nev. Rev. Stat. § 613.330
None	N.H. Code Admin. R. Per. 1205.02	RSA 354-A:7
N.J. Admin. Code tit. 4A, § 6-1.21A	N.J. Admin. Code tit. 4A, § 6-1.10	N.J. Stat. Ann. § 10:5-12
N.M. Admin. Code § 1.7.7.12	N.M. Admin. Code § 1.7.7.11	N.M. Stat. Ann. § 28-1-7
None	N.Y. Comp. Codes R. & Regs. tit. 4, § 22.1	N.Y. Exec. Law § 290 (Consol.)
N.C. Admin. Code tit. 25, r. 1E.0314(3) and N.C. Admin. Code tit. 25, r. 1E.1401	N.C. Admin. Code tit. 25, r. 1E.1101	N.C. Admin. Code tit. 25, r. 1L.0102
None	N.D. Admin. Code § 4-07-15-03	NDCC, 14-02.4-03
None	Ohio Admin. Code § 123:1-34-01	Ohio St. § 4112.02
Okla. Stat. tit. 74, § 840-2.22	None	Okla. Stat. tit. 74, § 840-2.9
Or. State Policy, Dept. of Admin. Services, § 60.000.15	None	Or. Rev. Stat. § 659A.030

State	Paid Sick Leave	Catastrophic or Sick Leave Bank
Pennsylvania	Pa. Code § 8.23(5) http://www.hrm.state.pa.us/oahrm	None
Rhode Island	R.I. Code R. 01-060-001 r.5.0623	None
South Carolina	S.C. Code Ann. § 8-11-40 S.C. ADC 19-710.04(6)	S.C. ADC 19-711.03
South Dakota	ARSD 55:01:22:02.04	ARSD 55:01:22:15.01
Tennessee	Tenn. Code Ann. § 8-50-802	Tenn. Code Ann. § 8-50-907
Texas	Tex. Gov't Code § 661.202	Tex. Gov't Code § 661.004
Utah	U.A.C. R477-8-7(4)(c)	U.A.C. R477-8-8
Vermont	21 V.S.A. § 472(b) State of Vermont Personnel Policies and Procedures 14.1	State of Vermont Policies and Procedures 14.1
Virginia	Va. Code Ann. § 51.1-1108	None
Washington	WAC § 356-18-060(2)&(3) WAC § 356-18-116	WAC § 356-18-112
West Virginia	W.Va. Code St. R. § 143-1-14.4(f)(6)	None

Family Medical Leave Without Pay (Non-discretionary)	Discretionary Leave Without Pay	Gender Discrimination
Pa. Code § 8.111	None	43 P.S. § 955
None	R.I. Code R. 01-060-001 r.5.066	R.I. Gen. Laws § 28-5-7
S.C. ADC 19-712.01(J)	None	S.C. Code Ann. § 1-13-80
ARSD 55:01:22:08.02	ARSD 55:01:22:06	S.D. Codified Laws § 20-13-10
Tenn. Comp. R. & Regs. 1120-6-.22	Tenn. Comp. R. & Regs. 1120-6-.14	Tenn. Code Ann. § 4-21-401
Tex. Gov't Code § 661.912	Tex. Gov't Code § 661.909	Tex. Lab. Code § 21.051
U.A.C. R477-8-9	U.A.C. R477-8-7(11)	Utah Code Ann. § 67-19-4 Utah Code Ann. § 34A-5-106
21 V.S.A. § 472(a)	21 V.S.A. § 472(g)	21 V.S.A. § 495
Va. Code Ann. § 2.2-1201(13)	None	Va. Code Ann. § 2.2-3900
WAC § 356-18-145	WAC § 356-18-140	Rev. Code Wash. (ARCW) § 49.60180
W.Va. Code St. R. § 143-1-14.8(b)	W.Va. Code St. R. § 143-1-14.8(a)	W. Va. Code § 5-11-9

State	Paid Sick Leave	Catastrophic or Sick Leave Bank
Wisconsin	Wis. Adm. Code ER 18.03(4)(c)	Wis. Stat. § 230.35(2m)(b)
Wyoming	WCWR 006-140-010 § 2(b)	WCWR 006-140-010 § 2(e)

Family Medical Leave Without Pay (Non-discretionary)	Discretionary Leave Without Pay	Gender Discrimination
Wis. Stat. § 103.10(3)(a)	Wis. Adm. Code ER 18.14	Wis. Stat. § 111.321
WCWR 006-140-010 § 15	WCWR 006-140-010 § 13(a)	Wyo. Stat. § 27-9-105

**Text of statute or regulation not available online

Supreme Court, U.S.
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No. 01-1368

IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS and UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF ALABAMA, ALASKA, DELAWARE, HAWAII, INDIANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 29 U.S.C. § 2612(a)(1)(C) exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment.

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The States joining this brief as *amici curiae* (hereinafter "the *amici* States") respectfully submit this brief pursuant to Sup. Ct. R. 37.4. The *amici* States submit this brief in support of Petitioners Nevada Department of Human Resources, et al., urging reversal of the judgment of the Court of Appeals for the Ninth Circuit.

INTEREST OF *AMICI CURIAE*

State governments employ more than 4.8 million full- and part-time workers.[1] As some of the nation's largest employers, the States have a significant practical interest in federal employment laws and policies, particularly those that may expose state governments to liability for civil damages. As guardians of their citizens' public fisc, the States also have an interest in ensuring that any abrogation of their Eleventh Amendment immunity comports with the constitutional framework for such action. Because the decision of the Court of Appeals in this case departed from this Court's now well-established precedent for determining when Congress may properly abrogate the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment, the *amici* States have an interest in seeing the Ninth Circuit's error promptly corrected.

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[1] *See* Governments Div., U.S. Census Bureau, *Government Employment March 2000* 1 (2002), http://www.census.gov/govs/apes/00emppub.pdf. As its title suggests, figures cited from *Government Employment March 2000* are based on data collected for the month of March 2000.

SUMMARY OF ARGUMENT

As early as the 1940s, many States created "family leave" programs for state employees by allowing them to use their sick leave to care for ill family members. By the time Congress enacted the Family and Medical Leave Act of 1993 (FMLA), 48 States had created such programs. Federal employees, in contrast, had no such program until the Federal Employee Family Friendly Leave Act of 1994. Prior to the FMLA, many States also offered their employees other family-friendly leave programs, such as discretionary leave without pay, and programs allowing employees to donate leave to other employees facing catastrophic or crisis situations. By 1993, approximately 34 States had also adopted state statutes addressing various family and medical leave issues, many of them patterned after earlier versions of the FMLA.

When Congress adopted the FMLA, it was not attempting to remedy a pattern of unconstitutional state conduct. Congress identified no such pattern of conduct. In fact, Congress specifically documented and highlighted the fact that most States were ahead of the Federal Government in addressing the family and medical leave needs of their employees. Congress cited the Equal Protection Clause of the Fourteenth Amendment as a justification for its own approach to leave issues, but it never accused the States of violating their obligations under the Constitution.

In holding that Congress had validly abrogated the States' sovereign immunity in adopting the FMLA, the Ninth Circuit failed to examine fully the States' family-friendly policies for state employees. Its burden-shifting framework for analyzing abrogation under Section 5 of the Fourteenth Amendment for statutes purportedly enacted to remedy sex discrimination was also erroneous. That framework is not only inconsistent with the analysis

employed by this Court in *Kimel* v. *Florida Board of Regents* and *Board of Trustees of University of Alabama* v. *Garrett*, which involved statutes enacted to address age and disability discrimination. It is also inconsistent with this Court's decision in *United States* v. *Morrison*, which involved a statute passed to address sex discrimination, and this Court's decisions upholding the Voting Rights Act of 1965, which was passed to address racial discrimination in voting. Due to these errors, the judgment of the Court of Appeals must be reversed.

ARGUMENT

Congress adopted the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601–2654 (2000), to create a national labor standard providing up to 12 weeks of unpaid leave to persons working for private or public employers with 50 or more employees. FMLA leave is available when necessary due to childbirth or to care for newborn infants, for placement of a child with the employee for adoption or foster care, to care for family members with a serious health condition, and to attend to an employee's own serious health condition. 29 U.S.C. § 2612(a)(1). Many of the *amici* States have offered their state employees personal sick leave and leave to care for ailing family members since the 1940s, and thus endorse the motives behind the FMLA and the family-friendly policies it has inspired. *Amici* fully recognize that the FMLA applies to state governments and do not challenge the statute's validity as Commerce Clause legislation. Indeed, the *amici* States charge their agencies and employees with following the FMLA both in letter and spirit.

In this case, however, the Court of Appeals for the Ninth Circuit erroneously held that the "family leave" provision of the FMLA, 29 U.S.C. § 2612(a)(1)(C), validly abrogates the States' sovereign immunity from suit. Pet. App. at 18a, 20a, 42a. The *amici* States are duty-bound to protect their citizens' public fisc from awards of monetary damages that would drain scarce state financial resources when such awards are not authorized by the Constitution. What the *amici* States seek, however, is merely to preserve their sovereign *immunity*, not to foster any form of *impunity* to disregard the legal obligations imposed by the FMLA.

The *amici* States endorse the Petitioners' cogent arguments in support of reversing the judgment of the Court of Appeals, and would draw this Court's attention

to three points. First, the States led the Federal Government in addressing family and medical leave issues; second, Congress failed to identify a pattern of unconstitutional state conduct in adopting the FMLA and was not attempting to remedy such conduct with the Act; and third, the Court of Appeals used a faulty burden-shifting framework to analyze abrogation under Section 5 of the Fourteenth Amendment. For these reasons, the judgment of the Court of Appeals must be reversed.

I. THE STATES LED THE FEDERAL GOVERNMENT IN ADDRESSING FAMILY AND MEDICAL LEAVE ISSUES.

Major federal legislation to address family and medical leave issues was first introduced in Congress as the Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985). This was hardly the first government effort to address the family and medical leave needs of state employees, however. Many States allowed their employees to utilize sick leave to care for ill family members as long ago as World War II.

A. Many States Permitted Their Employees to Use Sick Leave as Family Leave as Early as the 1940s, and 48 States Did So By the Time the FMLA Was Passed in 1993.

In *Nelson* v. *Dean*, 27 Cal. 2d 873, 168 P.2d 16 (1946), the Supreme Court of California ordered the state finance director and controller to pay a state employee for sick leave he took to care for his critically ill wife. The court upheld a State Personnel Board regulation defining sick leave for state employees

> to mean the absence from duty of an officer or employee because of his . . . attendance upon a member of his immediate family seriously ill and re-

> quiring the care or attendance of such officer or employee . . . .

Id. at 874, 168 P.2d at 17 (emphasis and internal quotation marks removed) (quoting Cal. Admin. Code. tit. 2, div. 1, ch. 1, art. 14, r. 191 (1945)); *see also Hatch* v. *Ward*, 27 Cal. 2d 883, 168 P.2d 22 (1946) (decided same day as *Nelson* v. *Dean*, ordering payment for 90 days' sick leave taken by state employee to care for her seriously ill mother). In upholding the California regulation, the court relied on the civil service rules of 16 States, all of which defined "sick leave" for state employees to "include leave to attend a sick member of the employe's immediate family." *Nelson* v. *Dean*, 27 Cal. 2d at 879–80, 168 P.2d at 20.

The court cited World War II–era regulations from Alabama, Connecticut, Florida, Idaho, Illinois, Kentucky, Louisiana, Maine, Michigan, Minnesota, Nebraska, North Carolina, South Carolina, Tennessee, Wisconsin, and Wyoming as support for its holding. *Id.* at 880 n.5, 168 P.2d at 20 n.5.[2] Other States with statutes from that era

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[2] The regulations (and authorizing statutes) cited by the court from those 16 states were:

Ala. Gen. Acts, 1939, No. 58, §§ 6, 9, subd. (b); Rules of State Personnel Board, rev. Oct., 1943, Rule XI, § 2, subd. (b).

Conn. Merit System Act, §§ 648e, 680e; State Civil Service Rule II, am. June 26, 1942.

Fla. Merit System Regulations, art. XIV; Fla. Industrial Commission Regulation No. 43, effective July 1, 1945.

Idaho Code, Ann., 1932, § 49-206; Merit System Council Regulation II, § 4.

Ill. Smith-Hurd Ann. Stats., ch. 24 1/2, § 42; Merit System Council Rules, art. XIV; Public Aid Commission, Bulletin 67, June 21, 1944, Rule I-B- 1.

Ky. Rev. Stats, §§ 42.110-42.150; Personnel Rules and Regulations, Rule XI, § 3.

La. Stats., 1940, Act. 172; Department of State Civil Service Rule XI, § 4.

Me. Rev. Stats., 1944, ch. 59, § 4, subd. L; State Personnel Board Rule XI, part 2.

Mich. Const., art. VI, § 22; Civil Service Commission Rule XII. Mich. Pub. Acts, 1941, No. 370; Civil Service Commission of Wayne County Rule 15, § 2 (b), effective Jan. 1, 1944.

Minn. Laws, 1939, ch. 441, § 6, subd. (a), and § 22, subd. (2); Civil Service Rules, § 13.8.

Neb. Sess. Laws, 1945, ch. 238, § 14; Regulations for a Merit System of Personnel Administration, art. XIV.

No. Car. Gen. Stats., 1943, § 126-2; Merit System Rule, May, 1941, art. XIV; Regulation on Attendance and Leave for County Welfare Departments, § 4.

So. Car. Civ. Code, 1942, § 4996-2; Rule for Merit System of Personnel Administration, rev. July 1, 1945, art. XIV; Administrative Regulations on Attendance and Leave, § 2, par. 2(a).

Tenn. Civ. Service Act, Pub. Acts, 1939, ch. 221, §§ 6, 28; Rules and Regulations for Administering the Civil Service Act, Department of Personnel Bulletin 3, 1940, § 15.5.

Wisc. Civil Service Law, § 16.275 Civil Service Rule XV, § 5.

Wyo. Laws, 1937, ch. 88, §§ 3, 5; 1940 Wyo. Supp., §§ 103-1603, 103- 1605; State Department of Public Welfare Rules, art. XIV.

Nelson v. *Dean*, 27 Cal. 2d at 880 n.5, 168 P.2d at 20 n.5. Of these 16 States, only Louisiana no longer allows state employees to use sick leave as family leave. See La. Civil Serv. Rule 11.13, http://www.dscs.state.la.us/progasst/csrules/chapter11/CHAP11B.HTM; La. Atty. Gen. Op. No. 00-190, 2000 WL 1005620, at *1 (June 1, 2000).

defining sick leave for state employees to allow leave to care for members of an employee's immediate family include New Jersey and Ohio. *See* Act of July 18, 1939, ch. 232, § 5, 1939 N.J. Laws 629, 631; Act of June 17, 1947, No. 124, 1947 Ohio Laws 368. Thus, more than a third of the States allowed their employees to use sick leave as "family leave" before 1950.

In some ways, these pre-FMLA state laws and regulations authorizing family leave for state employees were

more generous than the FMLA. Perhaps most significantly, the regulations created family leave by expanding the availability of employees' sick leave, which is nearly always *paid* leave. As Respondent Hibbs emphasizes, FMLA leave is *unpaid*, although paid leave may be substituted in some situations. *See* Hibbs Br. in Opp. at 2; 29 U.S.C. § 2612(c), (d). In addition, the definition of "family" under these regulations could be broader than the relationships covered by the family leave provision of the FMLA. *See* 29 U.S.C. § 2612(a)(1)(C) (limiting family leave to "the spouse, or a son, daughter, or parent, of the employee"). For example, in 1981, the State of Alabama Personnel Department readopted its regulation defining "sick leave" for state employees to include "attendance upon members of the immediate family whose illness requires the care of such employee." Ala. Admin. Code r. 670-X-14-.01(b)(3) (filed Sept. 29, 1981, amended 1985, 1995, 2001) (excerpts are from the 1981 version). It defined "immediate family" for purposes of sick leave "to include wife or husband, children, parents *or grandparents, sister or brother, mother-in-law and father-in-law*." Ala. Admin. Code r. 670-X-14-01(b) (emphasis added to show relationships not covered by FMLA). In addition, the 1981 regulation went even further, providing that "[w]here unusually strong personal ties exist, due to an employee's having been supported or educated by a person of some relationship other than those listed, this relationship may be recognized for leave purposes," following the filing of a written statement of the circumstances. *Id.*

State policies allowing state employees to use sick leave to care for ill family members became increasingly common over the years. By 1991, "the Office of Personnel Management (OPM) found that 46 state governments . . . allow[ed] use of sick leave for family illnesses." H.R. Rep. 103-722, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3289,

3290 (citing *Reinventing Human Resource Management, Accompanying Report of the National Performance Review* (Sept. 1993)); *see Reinventing Human Resource Management*, at 52–53 & 54 n.26 (quoting U.S. Office of Personnel Management, *Options for Leave Reform* 5 (Sept. 1991)); *see also* Workplace Economics, Inc., *1991 State Employee Benefits Survey: Benefits in Effect January 1, 1991*, 10.

By the time Congress passed the FMLA in 1993, 48 States had already created their own "family leave" plans for state employees by making sick leave available to care for ill family members. *See* Workplace Economics, Inc., *1993 State Employee Benefits Survey: Benefits in Effect January 1, 1993*, 19. In contrast, Congress did not authorize federal employees to use sick leave to care for family members until *after* the FMLA. *See* Federal Employees Family Friendly Leave Act, Pub. L. 103-388, 108 Stat. 4079 (1994) (adding 5 U.S.C. § 6307(d) (2000)). In doing so, Congress expressly relied on the States' experience with such family leave policies. *See* H.R. Rep. 103-722, at 2, *reprinted in* 1994 U.S.C.C.A.N. at 3290. In the appendix to this brief, the *amici* States have compiled a list of current state laws and policies permitting state employees to use sick leave to care for ill family members.

B. Many States Also Adopted Their Own Family and Medical Leave Statutes Prior to Enactment of the FMLA in 1993.

State responses to family and medical leave issues went beyond these modifications to sick leave policies, however. Half of the States also created programs that allowed employees to donate leave to other state employees. *1993 State Employee Benefits Survey*, at 19; *see, e.g.*, Ala. Admin. Code r. 670-X-14-.04 (Supp. Sept. 30, 2001) (creating "Sick Leave Bank"); Alaska Admin. Code tit. 2, § 08.070(b) (West, WESTLAW through July 2002); Kan.

Admin. Regs. 1-9-23 (West, WESTLAW through Jan. 1, 2001). Many States also had general provisions for leave without pay that could apply after paid family leave had been exhausted. *See, e.g.*, Ala. Admin. Code r. 670-X-15-.03 (Supp. Mar. 31, 1991); Iowa Admin. Code r. 581-14.5(19A) (West, WESTLAW through July 24, 2002). Forty-two States offered some form of day care assistance to employees, most commonly pre-tax dependent care accounts. *1993 State Employee Benefits Survey*, at 42. Twelve States offered assistance with caring for elderly parents, again most commonly pre-tax dependent care accounts. *Id.* Many States also began to address family and medical leave issues through more comprehensive statutes.

The earliest of these statutes focused on leave due to pregnancy or to care for a newborn or newly adopted child. In 1980, for example, California adopted a statute requiring employers to grant up to four months' pregnancy disability leave. *See* Cal. Gov't Code Ann. § 12945 (West Supp. 2002). The following year, California enacted a law giving female permanent state employees up to a year of unpaid leave for pregnancy or childbirth, and male spouses who were permanent state employees up to a year of unpaid leave to care for a newborn child. *See* Cal. Gov't Code Ann. § 19991.6 (West 1995).

In 1983, Illinois adopted a "family responsibility leave plan" for its state employees. *See* 20 Ill. Comp. Stat. Ann. 415/8c(5) (West 2001). In addition to the availability of sick leave for use as family leave, the statute provided up to a year's unpaid leave of absence for state employees "to meet a bona fide family responsibility." *Id.*; *see also* Ill. Admin. Code tit. 80, § 420.610(a)(2) (West, WESTLAW through June 28, 2002) (sick leave available for family leave). Such a "bona fide family responsibility" included

> leave incident to the birth of the employee's child and the responsibility thereafter to provide proper care to that child or to a newborn child adopted by the employee, the responsibility to provide regular care to a disabled, incapacitated or bedridden resident of the employee's household or member of the employee's family, and the responsibility to furnish special guidance, care and supervision to a resident of the employee's household or member of the employee's family in need thereof under circumstances temporarily inconsistent with uninterrupted employment in State service.

20 Ill. Comp. Stat. Ann. 415/8c(5).

As Congress began considering family and medical leave issues in the mid-1980s, States continued to adopt their own family and medical leave laws without waiting for federal action. Some of these statutes were essentially modified versions of the FMLA legislation pending in Congress. Other statutes targeted one or another of the leave issues later addressed in the FMLA.

When the Parental and Disability Leave Act of 1985 was introduced in Congress, it received a hearing in the House of Representatives, but died in committee in the first session of the 99th Congress. *See* H.R. Rep. 103-8(I), at 18 (1993); *see also* Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 Am. U. J. Gender & L. 39, 58 (1994) (reprinting Women's Legal Defense Fund, *Legislative Development of the Family and Medical Leave Act* (1993)) (hereinafter *Legislative Development*). The bill was reintroduced in 1986, with minor changes, as The Parental and Medical Leave Act of 1986, H.R. 4300, 99th Cong. (1986). A companion bill with the same title was also introduced in the Senate. S. 2278, 99th Cong., §§ 103, 104 (1986). The House bill received

hearings in the House of Representatives and was approved for consideration by the full House, but the 99th Congress adjourned before taking action on it. *See* H.R. Rep. 103-8(I), at 18–19; *Legislative Development*, at 59.

In 1987, family and medical leave legislation was again introduced in Congress as the Parental and Temporary Medical Leave Act of 1987, S. 249, 100th Cong. (1987), and the Family and Medical Leave Act of 1987, H.R. 925, 100th Cong. (1987). These bills received extensive congressional hearings. S. 249 was the subject of hearings before the Senate Subcommittee on Children, Families, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources in Washington, Boston, Los Angeles, Chicago, and Atlanta. *See* H.R. Rep. 103-8(I), at 19; *Legislative Development*, at 60–62. The House Committee on Education and Labor reported out a substitute for H.R. 925, but no action was taken on the floor of the House. *See id.* at 62. A Senate substitute, the Parental and Medical Leave Act of 1988, S. 2488, 100th Cong. (1988), was reported out of the Senate Committee on Labor and Human Resources, but died on the Senate floor in a filibuster. *See id.*

Meanwhile, several States decided to adopt their own family and medical leave statutes. Connecticut adopted a family and medical leave statute for state employees in 1987. *See* Conn. Gen. Stat. §§ 5-248a to 5-248b (2001). Maine and Wisconsin also adopted family and medical leave acts in 1987, but their statutes were applicable to state and private employees. *See* Me. Rev. Stat. Ann. tit. 26, §§ 843–848 (West 1988 & Supp. 2001); Wis. Code Ann. § 103.10 (West 1997 & Supp. 2002). In addition, Minnesota adopted a statute allowing state and private employees up to six weeks of unpaid leave due to the birth or adoption of a child, *see* Minn. Stat. § 181.941(1) (2000), and Colorado required employers who permitted paternity or maternity leave to make such time available to

adoptive parents, *see* Col. Rev. Stat. § 19-5-211(1.5) (2001).

Federal legislation was again introduced in 1989. Family and Medical Leave Act of 1989, S. 345, 101st Cong. (1989); H.R. 770, 101st. Cong. (1989). The House and Senate both passed H.R. 770 as amended by the Gordon-Weldon substitute in 1990. H.R. Rep. 103-8(I), at 20. The President vetoed the bill, however, and Congress failed to override the veto. *See id.*; *Legislative Development*, at 62–63.

During this two-year period, Connecticut, Minnesota, New Jersey, North Dakota, Oklahoma, and Rhode Island adopted additional state family and medical leave legislation. *See* Conn. Gen. Stat. Ann. §§ 31-51kk to 31-51qq (West 1997) (applicable to private employees) (prior version codified at Conn. Gen. Stat. §§ 31-51cc to 31-51gg); Minn. Stat. § 181.9413 (2001) (allowing public and private employees to use sick leave due to illness of or injury to employee's child); N.J. Stat. Ann. §§ 34:11B-1 to 34:11B-16 (West 2000); N.D. Cent. Code §§ 54-52.4-01 to 54-52.4-10 (2001); Okla. Stat. Ann. § 840-2.22 (West 2002) (renumbered from Okla. Stat. Ann. tit. 74, § 840.7c in 1994, prior version set out as not under tit. 74, § 840-2.22); R.I. Gen. Laws §§ 28-48-1 to 28-48-9 (Lexis 2000); *see also* Haw. Admin. R. § 12-46-108(a) (West, WESTLAW through July 2002) (requiring leave for reasonable period of time due to pregnancy, childbirth, and related conditions).

Federal legislation identical to that vetoed in 1990 was again introduced in Congress in 1991. Family and Medical Leave Act of 1991, H.R. 2, 102d Cong. (1991); *see also* S. 5, 102d Cong. (1991). The House and Senate passed amended versions of their respective bills, which were then reconciled in conference. H.R. Rep. 103-8(I), at 20–21. Congress passed the Conference Report in 1992.

This bill was vetoed in 1992, and Congress again failed to override. *See Id.* at 21; *Legislative Development*, at 65–66.

Meanwhile, Alaska, California, Florida, Georgia, and Hawaii adopted various forms of family and medical leave legislation. *See* Alaska Stat. §§ 23.10.500–23.10.550 (Lexis 2000); Alaska Stat. § 39.20.305 (Lexis 2000); Cal. Gov't Code Ann. § 12945.2 (West Supp. 2002); Fla. Stat. § 110.221 (2001); Ga. Code. §§ 45-24-1 to 45-24-9 (Supp. 1995) (repealed 1995); Haw. Rev. Stat. §§ 398-1 to 398-29 (1993 & Supp. 2001).

Finally, in January 1993, the bill that would become the FMLA was introduced in the 103rd Congress. Family and Medical Leave Act of 1993, S. 5, 103d Cong. (1993); *see also* H.R. 1, 103d Cong. (1993). The House amended its bill to conform to the Senate version, H.R. Rep. 103-8(I) at 17, and Congress passed the FMLA on February 4, 1993, *id.* at 1. President Clinton signed the FMLA into law the following day. Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6, 29. The substantive provisions of the FMLA took effect six months later. *See id.*, § 405(b)(1), 107 Stat. at 26.

As noted above in § I(A), by this time, 48 States had policies authorizing the use of sick leave to care for ill family members. H.R. Rep. 103-722, at 2, *reprinted in* 1994 U.S.C.C.A.N. at 3290. According to the Commission on Family and Medical Leave, approximately 34 States also had adopted statutes authorizing varying forms of family and medical leave for public or private employees. Comm'n on Fam. & Med. Leave, U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 45 (1996), http://www.dol.gov/dol/esa/public/regs/compliance/whd/fmla/chap3.pdf.[3]

[3] *See also* n.8 below and accompanying text.

II. CONGRESS WAS NOT REMEDYING UNCONSTITUTIONAL STATE CONDUCT WITH THE FMLA.

This Court has held that for Congress to invoke its enforcement authority under Section 5, "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). The congressional findings that support the FMLA, 29 U.S.C. § 2601(a), include no mention of state conduct or policies that Congress believed were in violation of the Fourteenth Amendment; indeed, state governments are not mentioned in Congress's findings at all. *See id.* As the Fourth Circuit has observed, "Congress did not identify . . . *any* pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care." *Lizzi* v. *Alexander*, 255 F.3d 128, 135 (4th Cir. 2001) (emphasis added), *cert. denied*, 122 S. Ct. 812 (2002). In the light of the States' leadership in addressing the family and medical leave needs of their employees, this is not surprising.

A. Congress Did Not Identify a Pattern of Unconstitutional State Conduct in Enacting the FMLA.

The Ninth Circuit held that Congress had identified a pattern of unconstitutional state conduct by pointing to two documents among the "snippets from legislative hearings concerning earlier versions of the FMLA,"[4] submitted by the United States. The first document was

[4] *Sims* v. *Univ. of Cincinnati*, 219 F.3d 559, 563 (6th Cir. 2000).

a 1990 Bureau of Labor Statistics ("BLS") survey cited in the Senate Report on the FMLA, which "found that 37 percent of surveyed private-sector employees were covered by 'maternity' leave policies, while only 18 percent were covered by 'paternity' leave policies." Pet. App. at 20a (citing S. Rep. No. 103-3, at 14–15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 17). The second document was the transcript of a congressional committee hearing held in 1986 in which a witness testified that a "survey of the private and public sectors done by the Yale Bush Center Infant Care Leave Project revealed that '[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.'" Pet. App. at 20a–21a (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the Committee on Education and Labor*, 99th Cong. 33 (1986) (prepared statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project), and citing *id.* at 29–30 (testimony of Meryl Frank)). The Court of Appeals concluded that, when "[t]aken together, the BLS and Yale Bush Center surveys constitute substantial evidence of *unconstitutional* state-sponsored gender discrimination in leave policies for state employees." Pet. App. at 21a (emphasis added).

This conclusion is flawed for several reasons. First, the Court of Appeals assumed that any disparity in the availability of maternity and paternity leave in the public sector was the result of *unconstitutionally* disparate leave policies for men and women. *See id.* The disparity between the availability of maternity and paternity leave, however, was more likely the result of policies meant to account for "actual physical disability on account of pregnancy, childbirth, or related medical conditions," which this Court upheld under Title VII in *California*

Federal Savings & Loan Ass'n v. *Guerra*, 479 U.S. 272, 290 (1987) (emphasis removed).[5] In *Guerra*, this Court reasoned that the Pregnancy Discrimination Act[6] amendments to Title VII were "not intended to prohibit all employment practices that favor pregnant women," *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 218 n.6 (1991) (White, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in part and concurring in judgment) (citing *Guerra*, 479 U.S. at 284–90), especially where the practice was tied not to stereotypical notions but instead to actual physical disability due to pregnancy or childbirth. *Guerra*, 479 U.S. at 290; *see also Geduldig* v. *Aiello*, 417 U.S. 484, 494–95 (1974) (holding that state disability insurance program that excluded from coverage disability due to normal pregnancy did not violate Equal Protection Clause). The disparity in leave availability could also have been the result of gender-neutral policies that varied from State to State or agency to agency.

Second, the Court of Appeals attributed the disparity to state governments, Pet. App. at 21a ("widespread *intentional* gender discrimination by states"), even though the 1986 testimony related to the entire "public sector." Local governments employ more than twice as many workers as state governments. *See Government Employment March 2000* at 1. Lumping States, which enjoy Eleventh Amendment immunity, together with counties and municipalities, which do not have such immunity, is

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[5] *See, e.g.*, Cal. Gov't Code Ann. § 12945(b)(2) (upheld in *Guerra*, requiring four months leave for female employees disabled because of pregnancy or childbirth); Alaska Stat. § 23.10.500(a) (providing same benefits to employee whose health is affected by pregnancy, childbirth, or related condition as granted to other employees with similar ability to work); Conn. Gen. Stat. § 46a-60(a)(7) (2001) (requiring reasonable leave of absence for disability resulting from pregnancy).

[6] Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

inappropriate. *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368–69 (2001). Next, the court concluded—without support from the legislative record—that Congress could infer that this information regarding maternity and paternity leave translated into similar gender-based disparities regarding family leave. Pet. App. at 21a. There is no evidence, however, that state policies allowing sick leave to be used as family leave discriminated on the basis of gender. Finally, by relying on it, the court apparently concluded that the information presented to the 99th Congress in 1986 regarding the similarities between patterns of leave availability in the public and private sectors was still valid seven years (and four Congresses) later when the FMLA was passed by the 103rd Congress in 1993.

It is doubtful that such an extended chain of questionable inferences could ever support a conclusion that there was some (unstated) congressional finding that state policies on family leave were unconstitutional. The chain crumbles, however, when confronted with the States' actual record in addressing family and medical leave issues and the FMLA's legislative history regarding state family and medical leave policies.

B. Congress Acknowledged the States' Leadership in Addressing Family and Medical Leave Issues.

Far from criticizing the States regarding their treatment of family leave issues, Congress expressly recognized that most States had already responded to their employees' leave needs by enacting some form of family or medical leave. In both the House and Senate Reports accompanying the FMLA, Congress included sections detailing progressive State laws on family leave issues:

FAMILY LEAVE LAWS IN THE STATES

Since Federal family leave legislation was first introduced, numerous States have begun to consider similar family leave initiatives. Approximately 30 States, the District of Columbia and Puerto Rico have adopted some form of family or medical leave.

California provides up to 16 weeks of leave over 2 years for the birth or adoption of a child, or for the serious health condition of a child, spouse, or parent. It applies to employers with 50 or more workers. California law also requires employers of five or more employees to provide women with a reasonable pregnancy disability leave of up to 4 months. Vermont provides 12 weeks of family and medical leave per year. Employers of 10 or more workers must provide leave to care for a newborn or newly adopted child; employers of 15 or more must also provide leave to care for the serious health condition of a worker's child, spouse, or parent, or for the worker's own serious health condition. The District of Columbia's law provides 16 weeks every 2 years for family leave, and a separate 16 weeks every 2 years for medical leave. Rhode Island's law provides 13 weeks of unpaid family and medical leave for birth, adoption or the serious illness of a family member and the worker's serious health condition. The Rhode Island law covers workers employed by firms of 50 or more. The Wisconsin law requires employers of 50 or more workers and the State government to grant up to 6 weeks of unpaid leave for the birth or adoption of a child, 2 weeks to care for a child, spouse or parent with a serious health condition, and 2 weeks of personal medical leave within a 12 month period. Oregon has enacted a law which

provides for 12 weeks of unpaid parental leave per child for childbirth or adoption for all workers employed by companies with 25 or more employees. Oregon has also enacted a family leave law that provides 12 weeks of leave every 2 years to care for a seriously ill parent or spouse or to care for a sick child for workers employed by companies of 50 or more. The law in Maine requires private employers and local governments having 25 or more employees and the State government to grant up to 8 weeks (over a 2 year period) of unpaid leave for birth, adoption, care of a family member with a serious illness or the employee's own serious illness. North Dakota's law covers State employees and provides 16 weeks of family leave per year for birth, adoption, illness of a spouse, child, or parent. Pennsylvania's law covers State employees and provides 6 months (24 weeks) of parental leave for the birth or adoption of a child. Puerto Rico guarantees 8 weeks paid pregnancy leave at half salary, which can be extended an additional 12 weeks in the event of complications. Puerto Rico's law applies to all employers, and all employees are eligible for coverage. Minnesota has a 6 week parental leave law for birth or adoption covering workers at firms with 21 or more employees.

These States join many others that have enacted laws or regulations protecting employees' right to some form of family or medical leave including Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, North Carolina, Oklahoma, Tennessee, Washington, and West Virginia.

S. Rep. 103-3, at 20–21, *reprinted in* 1993 U.S.C.C.A.N. at 22–23; *see also* H.R. Rep. 103-8(I), at 32–33 (similar language).

Many of the laws described in the Senate and House Reports provided greater benefits in some way than the FMLA—e.g., by providing longer leave periods (Pennsylvania), applying to private employers with fewer employees (Maine), or making paid leave available (Puerto Rico). This recitation of facts is more a ringing congressional endorsement of State conduct than an attempt to show a pattern of unconstitutional State behavior that required remedial action under Section 5 of the Fourteenth Amendment.

Moreover, Congress's list of States with "laws or regulations protecting employees' right to some form of family or medical leave" did not purport to be exhaustive, and the "Commission on Family and Medical Leave," which Congress created to study employee leave issues,[7] later found that the States' leave policies in 1993 were actually even a bit better than Congress had realized. According to the Commission, a total of 34 States plus the District of Columbia and Puerto Rico had adopted some form of family or medical leave by early 1993. *A Workable Balance*, at 45. Of the 34 States with family or medical leave laws or regulations in 1993, all 34 covered State employees, while 23 "had leave laws covering both private and state employees." *Id.* at 46.

For this conclusion, the Commission relied in part on a Department of Labor Women's Bureau publication cataloguing the States' family and medical leave laws as of early 1993, which the Commission characterized as one of the sources of "[t]he most complete information on state

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[7] *See* 29 U.S.C. §§ 2631–2633.

laws" regarding family and medical leave prior to the FMLA. *Id.* at 45–46 & nn.33, 34. The Women's Bureau publication suggested, moreover, that even the figure of 34 States was understated, because the Women's Bureau study was only "based on State *statutes*." Women's Bureau, U.S. Dep't of Labor, *State Maternity/Family Leave Law* 1 n.1 (1993) (emphasis added). The study noted that "[s]ome States may provide comparable leave to State and other public employees through personnel codes, policy, practice, executive order, or management directive." *Id.* [8]

The following year, Congress acknowledged that almost all States were, in fact, providing "comparable leave" to state employees by making sick leave available for use as family leave. As noted above, in 1994 Congress adopted the Federal Employees Family Friendly Leave Act; its House committee report noted that "the Office of Personnel Management (OPM) found that 46 state governments . . . allow[ed] use of sick leave for family illnesses." H.R. Rep. 103-722, at 2, *reprinted in* 1994 U.S.C.C.A.N. at 3290. The OPM report containing this figure was released in 1991; by 1993, the number of States had grown to 48. *See 1993 State Employee Benefits Survey*, at 19.

C. Congress Cited the Equal Protection Clause as Justification for Its Own Approach to Leave Issues, Not as the Basis for Remedial Legislation.

As Respondents have noted, Congress did refer to the Equal Protection Clause of the Fourteenth Amendment in the FMLA. 29 U.S.C. § 2601(b)(4), (5). Respondents

[8] The Women's Bureau figure was also understated due to the omission of an Arkansas statute making sick leave available as family leave for state employees. See Ark. Code § 21-4-206(b) (1996).

misinterpret the meaning of this reference, however. Congress's reference to equal protection is not found in the statement of congressional "Findings," but in the statement of congressional "Purposes." Congress set forth those purposes in 29 U.S.C. § 2601(b):

> It is the purpose of this Act—
>
> (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
>
> (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
>
> . . . .
>
> (4) *to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis*; and
>
> (5) *to promote the goal of equal employment opportunity for women and men, pursuant to such clause.*

29 U.S.C. § 2601(b) (emphasis added).

There is no hint of a congressional conclusion that the States had engaged in conduct that violated the Fourteenth Amendment. Instead, the reference to equal protection in § 2601(b)(4) is better understood as Con-

gress making clear that it intended its *own* approach to family and medical leave to comply with the principle of equal protection and equal employment opportunity. In other words, Congress was clarifying that it had designed the FMLA to avoid the risk of *causing* equal protection violations. Congress did not suggest, however, that the States (or local governments, for that matter) had failed to uphold their constitutional obligations in addressing family or medical leave issues in the past. "At best, Congress sought to 'minimize[ ] the *potential* for employment discrimination on the basis of sex.'" *Sims*, 219 F.3d at 564–65 (quoting *Florida Prepaid*, 527 U.S. at 641). Thus, the references to the Equal Protection Clause in the FMLA do not support a conclusion that the Act was adopted as remedial enforcement legislation under Section 5 of the Fourteenth Amendment.

The Senate and House reports confirm that Congress did not view the FMLA as remedying unconstitutional state conduct. In those reports, Congress expressed concern about enacting a leave provision for only one sex or group of employees. Thus, Congress drafted the FMLA so that it would

> address[ ] the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition.
>
> A law providing special protection to women or any defined group, in addition to being inequitable, *runs the risk of causing discriminatory treatment*. S. 5, by addressing the needs of all workers, avoids such a risk.
>
> Thus S. 5 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment.

S. Rep. 103-3, at 16 (emphasis added), *reprinted in* 1993 U.S.C.C.A.N. at 18; *see also* H.R. Rep. 103-8(I), at 29 (similar language).

Thus, Congress was working to uphold its *own* obligation to avoid the "risk of causing discriminatory treatment" in violation of equal protection or due process, while exercising its Commerce Clause powers to address leave issues and impose leave obligations on state actors. *See* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; *Vance* v. *Bradley*, 440 U.S. 93, 94 n.1 (1979) ("[T]he Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws."). Congress never accused the States of violating their obligations under the Fourteenth Amendment, however. As the Sixth Circuit observed regarding the 1993 House Reports in *Sims*, "[t]hese passages seek to justify the FMLA's provision of leave to all covered employees on the basis of the potential for gender-related discrimination. They do not suggest, however, that Congress was responding to a pattern of actual discrimination on the part of the States." 219 F.3d at 564.

III. THE COURT OF APPEALS EMPLOYED AN ERRONEOUS BURDEN-SHIFTING ANALYSIS FOR SECTION 5 ENFORCEMENT LEGISLATION.

Under this Court's precedents, "[t]he first step" in analyzing Congress's exercise of authority under Section 5 of the Fourteenth Amendment "is to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Next, having "determined the metes and bounds of the constitutional right in question,"

the Court "examine[s] whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States . . . ." *Id.* at 368; *Kimel*, 528 U.S. at 89. Finally, the Court determines whether the remedy or remedies chosen by Congress are congruent and proportional to the constitutional injury it identified. *Garrett*, 531 U.S. at 372; *see City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

The Ninth Circuit reasoned that the heightened scrutiny applicable to sex discrimination claims[9] distinguished this case from *Kimel* and *Garrett*, which involved classifications based on age and disability subject to rational-basis scrutiny. Pet. App. at 14a, 17a. When a gender-based classification is challenged, the burden of satisfying the standard of intermediate scrutiny rests with the State. *United States* v. *Virginia*, 518 U.S. 515, 533 (1996). With rational-basis scrutiny, the burden rests on the party challenging the classification "to negative '"any reasonably conceivable state of facts that could provide a rational basis for the classification."'" *Garrett*, 531 U.S. at 367 (quoting *Heller* v. *Doe*, 509 U.S. 312, 320 (1993), in turn quoting *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The Court of Appeals observed that the burden of proof placed on the State under intermediate scrutiny "has the effect of creating a rebuttable presumption of unconstitutionality for state-sponsored gender discrimination." Pet. App. at 14a.

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[9] See *Nguyen* v. *INS*, 533 U.S. 53 (2001); *United States* v. *Virginia*, 518 U.S. 515, 533 (1996); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

The Court of Appeals contrasted its "presumption of unconstitutionality" for sex-based classifications with classifications based on age and disability such as those at issue in *Kimel* and *Garrett*. "In effect," the court reasoned, in those cases "the relevant provisions of the ADA and the ADEA were subject to a *presumption of unconstitutionality*—the burden was on the defenders of the legislation to prove that it was valid under section 5." Pet. App. at 17a. The Court of Appeals stated that, "[w]hile the creation of such a presumption might appear extraordinary and incongruous, it makes sense in light of the Court's emphasis on the fact that state-sponsored age and disability discrimination is *not* subject to heightened scrutiny. The presumption of unconstitutionality applied to the ADA and the ADEA thus is merely the flip side of the presumption of constitutionality that is accorded to state-sponsored age and disability discrimination." *Id.* Pet. App. at 17a. The Court of Appeals then concluded that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, section 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional. That is, the burden is on the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct." Pet. App. at 18a (footnote omitted).

The Ninth Circuit's shifting presumptions for Section 5 analysis are inconsistent with this Court's precedent. First, the "presumption of unconstitutionality" that the Ninth Circuit claims was applied in *Kimel* and in *Garrett* does indeed "appear extraordinary and incongruous"—but principally because there is no such presumption, and this Court did not employ such a presumption in either case. Rather, as the Court stated in *United States* v. *Morrison*, congressional enactments enjoy a "presumption of constitutionality" and will be invalidated "only upon a plain showing that Congress has exceeded its constitu-

tional bounds." 529 U.S. 598, 607 (2000); *see also United States* v. *Harris*, 106 U.S. 629, 635 (1883). The opinions of this Court in both *Kimel* and *Garrett* show that Congress failed to identify a pattern of unconstitutional conduct by the States with respect to age or disability discrimination, and that Congress's remedies were disproportionate. *Garrett*, 531 U.S. at 368, 372; *Kimel*, 528 U.S. at 89, 86. Neither act was presumed unconstitutional; they were both *proven* unconstitutional.

Second, requiring "the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct" improperly allows a court to *presume* unconstitutional conduct and then forces the challenger to attempt the always difficult task of proving a negative. *Elkins* v. *United States*, 364 U.S. 206, 218 (1960) ("[I]t is never easy to prove a negative"). The Court of Appeals justified this remarkable burden because the FMLA was intended to address sex discrimination, which receives intermediate scrutiny.

This Court analyzed Section 5 enforcement legislation addressing sex discrimination in *Morrison*, however, and imposed no such burden of proving a negative, instead looking to the legislative record to see what Congress had actually found. 529 U.S. at 626 (noting that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"). The Court similarly did not presume unconstitutional behavior in analyzing the Voting Rights Act of 1965, but instead looked to the substantial record Congress assembled of unconstitutional state-sponsored discrimination in the context of voting rights. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 310–15 (1966). When Congress later failed to assemble a record of unconstitutional state conduct in support of lowering the voting age to 18 in state and local elections in the Voting Rights Act of 1970,

this Court held that Congress had exceeded its authority under Section 5. *See Oregon* v. *Mitchell*, 400 U.S. 112, 130 (1970) (opinion of Black, J.); *id.* at 212–13 (Harlan, J., concurring in part and dissenting in part); *id.* at 293–94 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part); *see also City of Boerne*, 521 U.S. at 530–31 (examining legislative record in case involving Free Exercise Clause of First Amendment).

Finally, the Court of Appeals' review of historical sex discrimination, Pet. App. at 23a–42a, raised its inquiry to a level of abstraction that rendered it ineffective as an analytical tool. It allowed the court to presume current unconstitutional behavior based on past (and in many instances, long past) behavior. It also permitted the court to cite past stereotypes generally to justify specific new requirements under Section 5 that substantively rewrite the underlying constitutional guarantee. *Cf. City of Boerne*, 521 U.S. at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States"). Although history may provide a basic framework and threshold for further analysis of state conduct, history *alone* is not sufficient to demonstrate a *current* pattern of unconstitutional behavior. The Ninth Circuit's approach mistakenly directs attention away from more recent and current state conduct, leading to other errors, such as ignoring the 34 States that had already enacted family or medical leave laws for their employees by the time Congress enacted the FMLA and the 48 States that had provided their employees family leave through their sick leave policies. *See* § I, above.

The Court of Appeals' substantial departures from "the[] now familiar principles" for analyzing congressional abrogation under Section 5 led it to conclude that

the FMLA's family leave provision, 29 U.S.C. § 2612(a)(1)(C), is appropriate Section 5 enforcement legislation. Under this Court's precedents, however, the family leave provision is neither congruent nor proportional to any constitutional injury identified by Congress. Thus, it is not appropriate Section 5 legislation.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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STATE LAWS AND POLICIES PERMITTING STATE EMPLOYEES TO USE PAID SICK LEAVE TO CARE FOR ILL FAMILY MEMBERS

Alabama

Ala. Admin. Code r. 670-X-14-.01 (Supp. Sept. 30, 2001), WL AL ADC 670-X-14-.01

Alaska

Alaska Stat. Ann. § 39.20.305(a) (Lexis 2000)

Alaska Admin. Code tit. 2, § 08.050(b) (West, WESTLAW through July 2002), WL 2 AK ADC 08.050

NOTE: Alaska has consolidated "sick leave" and "annual leave" for most State employees into "personal leave."

Arizona

Ariz. Admin. Code R2-5-404(A)(4) (West, WESTLAW through Mar. 31, 2002), WL AZ ADC R2-5-404

Arkansas

Ark. Code Ann. § 21-4-206(b) (Michie 1996)

Ark. Code R. 006 24 001, § 105.3.5(B) (West, WESTLAW through July 2002), WL AR ADC 006 24 001

California

Cal. Code Regs. tit. 2, § 599.745(d) (West, WESTLAW through Aug. 2, 2002) (represented employees), WL 2 CCR 599.745

Cal. Code Regs. tit. 2, § 599.745.1(a)(4) (West, WESTLAW through Aug. 2, 2002) (excluded employees), WL 2 CCR 599.745.1

Colorado

4 Colo. Code Regs. § 801, r. P-5-5 (West, WESTLAW through June 2002), WL 4 CO ADC 801

Delaware

Del. Code Regs. 10 450 002, r. 6.0310 (West, WESTLAW through July 2002), WL CDR 10 450 002

Florida

Fla. Stat. § 110.221 (2001)

Fla. Admin. Code Ann. r. 60K-5.030(2)(b)(3) (West, WESTLAW through June 1, 2002), WL 60 FL ADC 60k-5.030

Georgia

Ga. Comp. R. & Regs. r. 478-1-.18.303.1 (West, WESTLAW through Mar. 31, 2001), WL GA ADC 478-1-.18

Hawaii

Haw. Rev. Stat. § 79-32 (1993) (repealed eff. July 1, 2001, by 2000 Haw. Laws Act 253, § 132, but the repeal is not to affect the rights, benefits, and privileges of persons occupying civil service positions hired prior July 1, 2001, until those rights, benefits, and privileges are negotiated into collective bargaining agreements or established by executive order for civil service employees, *see* 2001 Haw. Laws Act 123, § 15)

Idaho

Idaho Admin. Code § 15.04.01.240.03 (West, WESTLAW through Apr. 3, 2002), WL IDAPA 15.04.01.240

Illinois

Ill. Admin. Code tit. 80, §420.610(a)(2) (West, WESTLAW through June 28, 2002), WL 80 IL ADC 420.610

Indiana

Ind. Admin. Code, tit. 31, r. 1-9-4(a) (West., WESTLAW through June 10, 2002), WL 31 IN ADC 1-9-4

Iowa

Iowa Admin. Code 581-14.3(19A)(11)(b) (West, WESTLAW through July 24, 2002), WL IA ADC 581-14.3(19A)

Kansas

Kan. Admin. Regs. 1-9-5(e)(1)(B) (West, WESTLAW through Jan. 1, 2001), WL KS ADC 1-9-5

Kentucky

101 Ky. Admin. Regs. 2:102(2)(2)(a)(3) (West, WESTLAW through Aug. 15, 2001) (classified service), WL 101 KAR 2:102

101 Ky. Admin. Regs. 3:015(2)(2)(a)3 (West, WESTLAW through Aug. 15, 2001) (unclassified service), WL 101 KAR 3:015

Maine

Me. Code R. 18-389, ch. 11, § 2(C)(4)(d) (West, WESTLAW through June 2002), WL 18-389 CMR Ch. 11, § 2

Maryland

Md. Code Ann., State Pers. & Pens. § 9-501(b)(2) (Michie 1997)

Massachusetts

Mass. Rules Governing Leave & Other Benefits for Managers & Confidential Employees § 4.07 (Jan. 28, 2002), http://www.state.ma.us/hrd/redbook0400.htm

Memorandum from James J. Hartnett, Jr., Personnel Administrator, to Cabinet Secretaries, Department Heads, and Agency Heads re Implementation of Enhanced Family Friendly Policies and Benefits (Apr. 28, 2000) (describing incorporation of enhanced sick leave for family care benefits to be incorporated into collective bargaining agreements), http://www.state.ma.us/hrd/training/hrdnew/employee_services/ES_Emp_Bene/ES_EB_Family_Friendly/FMLA_policy_memo.doc

Michigan

Mich. Civ. Serv. Reg. 5.10(3)(B)(4)(a) (eff. Mar. 18, 2001), http://www.michigan.gov/mdcs/1,1607,7-147-6877_9788-20165--,00.html

Minnesota

Minn. Stat. § 181.9413(a) (2000)

Mississippi

Miss. Code Ann. § 25-3-95(2) (Lexis 1999)

Miss. Code R. 46 000 001, § 7.22.3a (West, WESTLAW through July 2002), WL 46 000 CMSR 001

Missouri

Mo. Code Regs. tit. 1, § 20-5.020(2)(K) (West, WESTLAW through June 30, 2002), WL 1 MO ADC 20-5.020

Montana

Mont. Code Ann. § 2-18-601(11) (2001)

Mont. Admin. R. 2.21.122(7) (West, WESTLAW through Mar. 31, 2002), WL ARM 2.21.122

Mont. Admin. R. 2.21.132(1)(h) (West, WESTLAW through Mar. 31, 2002), WL ARM 2.21.132

Nebraska

Neb. Admin. Code tit. 273, ch. 9, § 005.01D (West, WESTLAW through Apr. 22, 2002), WL 273 NAC Ch. 9, § 005

Nevada

Nev. Admin. Code § 284.554(6) (West, WESTLAW through Apr. 19, 2002), WL NAC 284.554

New Hampshire

N.H. Code Admin R. Per. 1204.05(c) (West, WESTLAW through July 15, 2002), WL NH ADC PER 1204.05

New Jersey

N.J. Admin. Code § 4A:6-1.3(g)(3) (West, WESTLAW through Aug. 19, 2002), WL NJ ADC 4A:6-1.3

New Mexico

N.M. Admin. Code § 1.7.7.10(D) (West, WESTLAW through July 2002), WL NM ADC 1.7.7

New York

N.Y. Civil Serv. R. & Regs. § 21.3(f) (McKinney 1999), WL NY CIV SERV App § 21.3

North Carolina

N.C. Admin. Code tit. 25, § 1E.0305(4) (West, WESTLAW through July 30, 2002), WL 25 NCAC 1E.0305

North Dakota

N.D. Admin. Code § 4-07-13-07(3) (West, WESTLAW through Aug. 1, 2002), WL NDAC 4-07-13-07

Ohio

Ohio Rev. Code Ann. § 124.382(D) (Anderson 2001)

Oklahoma

Okla. Stat. Ann. tit. 74, § 840-2.22(A), (C)(1)(c), (C)(2) (West 2002)

Okla. Admin. Code § 530:10-15-12(1) (West, WESTLAW through August 15, 2000), WL OK ADC 530:10-15-12

Oregon

Ore. Rev. Stat. § 659A.174(3) (2001)

Ore. Admin. R. 839-009-0280 (West, WESTLAW through May 15, 2002), OR ADC 839-009-0280

Ore. Dep't Admin. Servs., Hum. Res. Servs. Div. State Policy 60.000.01(1)(a)(A) (Eff. Aug. 24, 2001), http://www.hr.das.state.or.us/hrsd/policy/P6000001.pdf

Pennsylvania

4 Pa. Code § 30.23(5) (West, WESTLAW through Aug. 2002), WL PA ADC § 30.23

Pa. Personnel R. 8.23(5) (Gov.'s Mgmt. Dir. 505.7, Feb. 24, 1998), http://www.hrm.state.pa.us/oahrm/LIB/oahrm/20/11/505-7.pdf

Rhode Island

R.I. Code R. 01 060 001, r. 5.0623 (West, WESTLAW through July 2002), WL RI ADC 01 060 001

South Carolina

S.C. Code § 8-11-40 (2002)

S.C. Code Ann. Regs. § 19-710.04(6) (West, WESTLAW through Mar. 22, 2002), WL SC ADC 19-710.04

South Dakota

S.D. Admin. R. 55:01:22:02.04(2) (West, WESTLAW through July 10, 2002), WL SD ADC 55:01:22:02.04

Tennessee

Tenn. Code Ann. § 8-50-802(a)(3) (Lexis Supp. 1999)

Tenn. Comp. R. & Regs. 1120-6-.12(1)(e) (West, WESTLAW through July 29, 2002), WL TN ADC 1120-6-.12

Texas

Tex. Gov't Code Ann. § 661.202(d), (e) (Vernon Supp. 2002)

Utah

Utah Admin. Code R477-8-7(4)(c) (West, WESTLAW through Apr. 1, 2002), WL UT ADC R477-8

Vermont

Vt. Stat. Ann. tit. 21, § 472(b) (Supp. 2001)

Washington

Wash. Rev. Code Ann. § 49.12.270 (West 2002); *see also* 2002 Wash. Legis. Serv. Ch. 243 (S.S.B. 6426) (West) (amending § 49.12.270 eff. Jan. 1, 2003)

Wash. Admin. Code § 356-18-060(2), (3) (West, WESTLAW through July 3, 2002), WL WA ADC § 356-18-060

West Virginia

W. Va. Code St. R. § 143-1-14.4(f)(6) (West, WESTLAW through June 2002), WL WV ADC § 143-1-14

Wisconsin

Wis. Stat. Ann. § 103.10(5)(b) (West 1997 & Supp. 2000)

Wis. Admin. Code § ER 18.03(4)(c) (West, WESTLAW through June 2002), WL ADC § ER 18.03

Wyoming

Wyo. R. & Regs. AI PSD ch. 10, § 2(b) (West, WESTLAW through May 24, 2002), WL WY ADC AI PSD Ch 10 § 2

***See also*:**

Virginia

Rather than allowing employees to use sick leave to care for ill family members, Virginia created separate paid "family and personal leave." Va. Code § 51.1-1107 to 51.1-1108 (2002). Employees are entitled to 32 to 40 hours of such "family and personal leave" per year depending upon length of service with the State.

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No. 01-1368

IN THE SUPREME COURT OF THE UNITED STATES

NEVADA DEPT OF HUMAN RESOURCES,
PETITIONER,

V.

HIBBS, WILLIAM, ET AL
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Is the care-taking leave provision, or any other provision of FMLA a valid enactment of Congress under the Fourteenth Amendment?

Can Congress abrogate Eleventh Amendment Immunity under the enforcement provisions of the Fourteenth Amendment?

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INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state, local and tribal officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner and counsel to the respondents have consented to the filing of this amicus brief. Consent letters are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

The framers of the Fourteenth Amendment never intended to prohibit diverse treatment of men and women when they wrote the equal protection clause. That fact was the basis of over a century of consistent jurisprudence by this Court. So even if Congress claimed to be enforcing the requirements of the Fourteenth Amendment, provisions against sex discrimination would not be "appropriate legislation."

Moreover, the text of the FMLA strongly suggests that Congress did not pass that act to enforce the Fourteenth Amendment. Attempts by the government to defend FMLA application to States under the Fourteenth Amendment is a post hoc attempt to justify constitutionally dubious provisions, which are impermissible under the "commerce clause."

Finally, we urge the Court to revise its understanding of the relation between the Fourteenth and Eleventh Amendments. This Court for more than a century believed that both amendments could be given full effect side by side (e.g. *ex parteYoung*), and the Court's *Fitzpatrick* decision handed down more than a century after

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

ratification of the Amendment was a solitary departure from established precedent. *Fitzpatrick* remains the only case in which this Court has permitted suit against an unconsenting State under the Fourteenth Amendment.

ARGUMENT

I. FMLA was not validly enacted under the Fourteenth Amendment

A. Equal protection does not mean "equal treatment"

Congress allegedly enacted the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 et seq., "to promote the goal of equal employment opportunity for women and men pursuant to [the equal protection] clause" 2601(b)(5). We do not believe that such a statement amounts to a claim to have been enacting FMLA under the Fourteenth Amendment. To "promote the goals" of an amendment is not the same things as to be "enforcing" an amendment.

As a matter of first principles, however, we feel compelled to point out that the equal protection clause does not guarantee "equal employment opportunity for men and women." The Framers of the Fourteenth Amendment surely never imagined such a thing, and for a full century following the adoption of the Amendment up through the most recent cases, this Court has repeatedly found that "equal treatment" is not required.

Constitutional scholars, on the left and the right, are virtually unanimous in the view that the Framers of the Fourteenth Amendment did not mean to include sex discrimination in its confines. As Justice Ginsberg noted in a 1979 discussion of the Fourteenth Amendment given at Washington University:

> The equal status and dignity of men and women under the law is the animating purpose of the proposed Equal Rights Amendment. By contrast, the framers of the fourteenth amendment did not contemplate sex equality. Boldly dynamic interpretation, departing radically from the original understanding, is required to tie the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities and opportunities. . . . [it is] difficult to elaborate bold doctrine regarding sex discrimination when even a starting point is impossible to anchor in the constitutional fathers' design.[2]

There is ample evidence from the debates on the Fourteenth Amendment and simultaneous debates on the Civil Rights Act to justify Justice Ginsberg's conclusion. Numerous congressmen made comments pointing out that "equal protection" did not mean that women and children would be entitled to the same civil rights as adult men:

> Its whole effect is to require that whatever rights as to each of those enumerated civil . . . matters the States may confer upon one race or color of citizens shall be held by all races in equality. Your State may deprive women of the right to sue or to contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise. . . . It secures–not to all citizens, but to all races as races who are citizens–equality of protection in those enumerated civil rights which states may deem proper to confer upon any races. Globe at 1295.

A long and consistent string of precedents by this Court also bears out Justice Ginsberg's conclusion.

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[2] Ruth Bader Ginsberg, "Sexual Equality under the Fourteenth and Equal Rights Amendments," *Wash. U. Law Q.* vol 1979:159, 161-178.

Just five years after ratification of the Fourteenth Amendment this Court in *Bradwell v. Illinois*, 83 U.S. 130 (1873) upheld the prohibition on women practicing law, explicitly rejecting the view that the Fourteenth Amendment required equal treatment of woman: "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." While many people today might reject that theory, there is little doubt that this expressed the views of the majority of people at the time of ratification as well as the views and intentions of the Framers.

This Court continued to hold that basic position for decades. The Court repeatedly upheld laws restricting women from working in various "dangerous" or inappropriate jobs: *Muller v. Oregon*, 208 U.S. 412 (1908) and *Dominion Hotel v. Arizona*, 249 U.S. 265 (1919) limiting the hours a woman could work; *Radice v. New York*, 264 U.S. 292 (1924) limiting night work by women. In 1937 the Court upheld a separate minimum wage law for woman and minors which did not apply to men, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379. In 1948, the Court upheld prohibitions on women tending bar, *Goesaert v. Cleary*, 335 U.S. 464. The Court upheld both exclusion of woman from juries, and in 1961 the exemption of women from jury duty who did not wish to serve, *Hoyt v. Florida*, 368 U.S. 57. These are just a few of the decisions of this court permitting unequal treatment of men and women in employment.

Today, many of these views would be regarded as archaic. However, if "the original understanding underpinning High Court precedent from 1873 to 1961" (Ginsberg, Sexual Equality, 163) means anything, then this history and precedent cannot be simply disregarded. We believe it must be taken into account when considering the meaning and scope of the Fourteenth Amendment.

As Justice Rehnquist wrote in dissent for *Trimble v. Gordon* (430 U.S. 762 (1977)):

> Every law enacted, unless it applies to all persons at all times and in all places, inevitably imposes sanctions upon some and declines to impose the same sanctions on others. But these inevitable concomitants of legislation have little or nothing to do with the Equal Protection Clause of the Fourteenth Amendment, unless they employ means of sorting people which the draftsmen of the Amendment sought to prohibit.

While the Court in recent years has on occasion departed from both its earlier precedents and the intent of the Framers, the permissibility or impermissibility of sex discrimination is far from a settled question. No consistent standard of review has emerged, but rather the Court has adopted an "intermediate" level, or what some have referred to as a "sliding scale," of review.[3] What is important is that even when this Court has struck down "unequal" standards for men and woman, it has done so on narrow grounds, for example ruling that the particular discrimination at issue might "perpetuate a stereotype" (as in *Mississippi U. for Women v. Hogan*, 458 U.S. 718 (1982)), but not because gender distinctions are inherently suspect.

In the last 30 years, this Court has repeatedly upheld unequal laws for men and women such as in *Kahn v. Shevin* (416 U.S. 351 (1974)), *Schlesinger v. Ballard* (419 U.S. 498 (1975)), *Califano v. Webster* 430 U.S. 313 (1977), *Regents v. Bakke* (438 U.S. 265 (1978), *Rosker v. Goldberg* (453 U.S. 57 (1981)), *Cal. Federal v. Guerra* (479 U.S.272, (1987).

This Court continues to uphold the view that the Fourteenth Amendment does not require that men and woman be treated equally in all respects. As Justice Rehnquist wrote for the majority

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[3] The "sliding scale" standard was first espoused by Justice Marshal's dissent in *Dandridge v. Williams* (397 U.S. 471 (1970), and while that view has never been officially embraced by this Court it is hard to see much difference between a multiple level scale and a "sliding scale."

in *Michael M. v. Sonoma County* (450 U.S. 464 (1981)) (in which criminal violations for statutory rape were applied only to males):

> Gender-based classifications are not "inherently suspect" so as to be subject to so-called "strict scrutiny," but will be upheld if they bear a "fair and substantial relationship" to legitimate state ends. *Reed v. Reed*, 404 U.S. 71. Because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same," *Rinaldi v. Yeager*, 384 U.S. 305, a statute will be upheld where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.

As recently as 1996 (in *US v. Virginia,* 518 U.S. 515) this Court went out of its way to emphasize that:

> The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible."

We believe that given the clear intent of the Framers, the consistent precedents from 1870s through the 1970s, and the somewhat ambiguous rulings since then, that this Court must be very careful not to convert the "equal protection clause" into something it was never intended to be: a de facto Equal Rights Amendment. Nor should this Court adopt "dynamic interpretation, departing radically from the original understanding" in order to come to a conclusion no matter how desirable that conclusion may be to some people.

The fact that no State may "deny to any person within its

jurisdiction the equal protection of the laws" simply does not mean a State must treat all people equally:

An infant, a foreigner, an insane person, and a competent adult citizen are all entitled to "equal protection of the laws" within a State's competent jurisdiction–each is entitled to protection of the State as much as any other. Clearly, however, infants, foreigners, the insane and adult citizens have widely divergent legal rights. Only by plucking the word "equal" out of all historical and even linguistic context, could one attempt to convert "equal protection" into "equal rights."

B. The Ninth Circuit's Attempt to Redefine FMLA as a Fourteenth Amendment Issue is wrong

The legislative history of FMLA suggests that Congress did not consider FMLA to be enacted under the Fourteenth Amendment. The House Committee on Education and Labor for example concluded, "The FMLA addresses the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition" (H.R. Rep. No. 103-8, pt. 1, at 29 (1993).

Similarly the Committee on Post Office and Civil Service noted with respect to FMLA "If an employer denies benefits to its work force, it is in full compliance with anti-discrimination laws because it treats all employees equally." (At 11, also cited by the Sixth Circuit in *Sims v University of Cincinnati* (99-3274) section 3B). This statement strongly suggests that the committee believed that FMLA was doing more than could be required under "civil rights" legislation.

The Act's language suggests that Congress was acting under the "commerce clause." Section 2611(4)B declares "a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce."

The legislation as enacted made no attempt to ensure

"equal" benefits for men and women since it explicitly avoided pre-empting state legislation which gave greater benefits, even when those benefits were more favorable to women. Legislators, for example, surely knew that California gave longer maternity leave to new mothers than FMLA would guarantee to new fathers and that such a policy had been upheld by this Court in *Cal. Fed v. Guerra* (479 U.S. 272 (1987)).

A Fourteenth Amendment provision presumably would have made some effort to ensure that state laws which provided additional benefits did so on a "gender neutral basis." No such effort was made. Failure to do so, coupled by the explicit assertion that "a public agency shall be considered to be a person engaged in commerce" leads inexorably to the view that Congress was most likely appealing to interstate commerce.

C. The Ninth Circuit misconstrues the long history of constitutionally permissible "unequal" treatment of men and women

In attempting to compensate for the lack of a history of unconstitutional discrimination by the States in employment, the Ninth Circuit decision declared that: "when our nation's judicial history already documents unconstitutional discrimination against the class at issue, there is no need for Congress separately and redundantly to provide detailed findings of such discrimination in order to exercise it's fourteenth amendment powers" (16776).

However, the "history of unconstitutional discrimination" cited by the Ninth Circuit is decisions such as *Bradwell v. Illinois*, and other decisions of this Court upholding unequal treatment–decisions penned by some of this Court's most eminent and respected jurists. What the Ninth Circuit is bemoaning is the fact that this Court has repeatedly found unequal treatment to be perfectly *constitutional*, and citing those rulings as a history of *unconstitutional* action.

The Ninth Circuit even goes so far as to criticize "The

modern trend noted above to provide more generous family care leave to women" (at 16777) despite this Court's recent decision in *Cal Fed. v. Guerra*.

The Ninth Circuit seems to be making the rather perverse argument that since the Constitution for so long was understood *not* to require equal treatment for women, that fact justifies re-interpreting the same provisions of the Constitution to compensate.

Prior to 1971 there were no findings of unconstitutional state sex discrimination by this Court. Rather than demonstrating a record of unconstitutional discrimination, it appears to us on the contrary to be evidence that there is nothing unconstitutional about the "unequal" treatment of men and women.

The Ninth Circuit tries to make much of the fact that "before 1969 EVERY State had some form of labor legislation 'protective' of woman only" (emphasis original). Far from being an argument that such "protective laws" are unconstitutional, it would seem to provide strong *prima facie* evidence that such laws are permissible, especially given this Court's frequent review and approval of such laws. Surely, however, it is a uniquely perverse argument to think that laws being so universally accepted is somehow evidence that they were stereotypes and therefore are now unconstitutional.

The history of state legislatures repealing many of these laws, only helps demonstrate that women are not a "discreet and insular minority" in need of protection from this Court. The history also demonstrates the benefits of representative government that state laws have changed with the changing values of our society, rather than being etched in stone as a result of decisions of this Court. Indeed, the Courts must always be careful to avoid elevating contemporary (and perhaps transitory) standards into constitutional requirements.

Dealing with issues of sex discrimination should be a matter reserved to the States to handle. Since women constitute more than 50% of the electorate they are more than able to protect

themselves through ordinary democratic means.

II. FMLA is about social policy, not civil rights, and exceeds the power of Congress to regulate commerce among the States

The Ninth Circuit declares that Congress "appropriately enacted the FMLA under the Fourteenth Amendment . . . to foster equal participation in both economic *and domestic life* by both men and women" (emphasis added, at 16777-8). Statements such as this, combined with the Findings and Purposes of the act helps illustrate that FMLA is far more about social policy than about civil rights, or even regulation of commerce.

As Justice O'Connor wrote for the majority in *New York v. U.S.* (505 U.S. 144 (1992)):

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.

FMLA is precisely the sort of legislation which falls into this category. We think the framers of the Fourteenth Amendment, as much as of the original Constitution, would be shocked by FMLA for both reasons. We doubt that the commerce clause provides enough justification to warrant federal intrusion into an area of family law and social policy long regarded as the province of the States, but such legislation under the Fourteenth Amendment is even less tenable.

The States, as a matter of their general jurisdiction have the authority and responsibility to pass laws which will encourage strong and healthy families. Of course, any such legislation which makes use of contemporary understanding about the proper roles of

family members is liable to be labeled by some future age as based on stereotypical views. In fact, while many people today believe that families are more healthy in a traditional two parent (mother and father) situation, others discount that as a stereotype.[4]

In any case, while we believe that States may encourage healthy families (and indeed family law remains an area of law "reserved to the States") regulation of private action, particularly domestic life certainly cannot be within the boundaries of enforcing equal protection of the laws. To uphold such a view one "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the commerce clause" or the Fourteenth Amendment "to a general police power of the sort retained by the States" (*Lopez* 514 U. S. 549 at 568).

Even viewed under the banner of regulating interstate commerce we believe that FMLA exceeds the authority of Congress and intrudes upon areas of law constitutionally reserved "to the States" under the Tenth Amendment.

In Federalist 45 James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.
>
> These words have been cited by this court over and over in

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[4] The point is that one man's stereotype is another man's truism, and so basing constitutional law on the assertion that "stereotypes" disqualify a law tends to reduce constitutional law to the variable and subjective standard of what a judge happens personally to believe constitutes a stereotype.

recent years as the central expression of the Founders regarding the division of powers between local and national government, particularly with reference to analyzing the commerce clause powers of Congress (e.g. dissent in *Garcia* (*469 U.S. 528 at 570)*, *Gregory v Ashcroft* (501 U. S. 452 at 468 (1991)), *Lopez v. US* (514 U.S. 550, at 553), *US v. Morrison* (529 U.S. 598, at sec. II)).

The Findings and Purposes section of FMLA sec. 2601 lacks even the hint that FMLA was enacted to promote or affect interstate commerce. According to its Purposes, 2601 (b) 1, it was enacted primarily in order "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." Neither the commerce clause or any enumerated power of Congress gives the federal government jurisdiction to pass laws "preserving family integrity." That is precisely the sort unenumerated power reserved to the States. Lack of any statement in the Purposes section tying the legislation to national economic needs suggests that "[a]bsent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce." (*Lopez*, Concurring opinion of Kennedy and O'Connor).

Any suggestion that FMLA is based on regulation of commerce would seem to based on the "national productivity" argument that the government advanced in *Lopez*. Yet as Chief Justice Rehnquist wrote concerning that argument:

> [U]nder the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of 922(q),

> it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

Moreover, two years ago in *Morrison*, the Chief Justice, paraphrasing the above quote from *Lopez*, explicitly cited "childrearing" as an area of family law reserved to the States. Again discounting the "national productivity" argument this Court declared that "such reasoning will not limit Congress to regulating violence, but may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."

FMLA is a significant federal intrusion into what could well be described as family law, as well as child care. If child custody and child rearing issues go beyond federal power to regulate commerce, then it is hard to see how leave-taking provisions of FMLA should be viewed any differently, even if issues of child care do affect the productivity of some workers.

Finally, we would also suggest the Court take this opportunity to review the 5-4 ruling in *Garcia v. San Antonio* (469 U. S. 528 (1985)), in which the majority declared that whatever limitations there were on the commerce clause powers of Congress that Congress alone was to decide those limits, and in so doing subjected state and local government to labor laws passed under the "commerce clause." The reasoning in *Garcia* has been quite openly rejected in *New York v. US*, *Lopez v. US*, and *US v. Morrison*.

Since *Garcia* has been implicitly undermined by more recent decisions, it ought to be explicitly abandoned.

If *Garcia* has been implicitly overruled it would make sense to return to something like the *status quo ante*, as expressed in *National League of Cities v. Usery* (426 U.S. 833 (1976), in which the court noted that traditional areas of local responsibility were a buffer to the commerce clause powers of Congress, an approach suggested by *Lopez*, and *Morrison*.

Secondly, with respect to *Garcia*, at oral arguments for *Alden v. Maine* (527 U.S. 706) the Solicitor General argued that if States could not be sued for violation of FLSA that the statute may as well be "written in disappearing ink." It should now disappear.

What is more, *Garcia* runs counter to the fundamental structure of the federalism. As Madison wrote in the Federalist 39:

> [T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.

It is as preposterous for the federal government to determine the pay and qualifications for local employees, as it is for a local government to determine the pay and qualifications for federal troops.

III Irrespective of whether "sex discrimination" is prohibited by the Fourteenth Amendment, failure to provide pregnancy or sick leave have recently been found to be constitutional, and there is no reason to regard "family leave" any differently

Neither refusing maternity leave nor providing maternity leave for women only have been found to be "invidious discrimination under the Equal Protection Clause."

The Ninth Circuit opinion makes a great deal of Congressional testimony on FLMA that declared that, "In the absence of a family leave standard, child birth and the need to care for a sick child or parent have an adverse impact on woman's

earnings." S. Rep. 102-68 at 37 (cited 16786).

While it is undoubtedly true that the need to miss work in order to give birth to a child (or for any other reason) often has "an adverse impact on woman's earnings," this Court has already ruled that it is no violation of equal protection when such leave is denied. In *Guldug v. Aiello* (417 U.S. 484 (1974)), this Court declared that "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition" (at 497).

Two years later when the circuit court tried to argue that sex discrimination under title VII prohibited the kind of laws upheld in *Guldug* this Court reaffirmed in *General Electric v Gilbert* that "exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." (429 U.S. 125 at 136 (1976)).

In addition to providing no leave, this Court has also upheld state provisions providing additional leave to women only in *Cal Fed v. Guerra* (479 U.S. 272 (1987).

These precedents strongly suggest that failure to provide sick leave or leave to care for the ill does not violate equal protection.

As this Court noted in *General Electric* (429 U.S. at 139):

> For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other.

Applying that same reasoning to the care-taking leave provisions at issue in the current case, results in the same conclusion. Even if it could be shown that providing no leave to care for an ill relative weighed "more heavily upon one gender than upon the other" that would not be sufficient to constitute discrimination. It would also run afoul of the "common sense notion" that if an employer offered no family leave at all, and treats everyone the same, that such an employer somehow was discriminating, because it affected some women (but not all women) more than other people.

Lack of care-taking leave would, of course, also affect some men, (those with sick children or relatives, who wished to take leave) more than it would affect some women (single women with no relatives, for example). Such a circumstance does not fit very neatly into traditional "discrimination."

In addition, we believe that the "disproportionate impact" argument is an amorphous claim which could be used to challenge almost any state or federal law simply by showing a statistical disproportion among sexes, races or religions. For example, a recent study published in *Journal of Marriage and the Family* shows that religious fathers want to spend more time with their families than fathers with no religion. One could argue that failure to provide family leave disproportionately affects religious parents. Also, it is undoubtedly true that some ethnic groups are more family oriented than others. It could also be argued that lack of care-taking leave is "age discrimination" since its disproportionately affects parents of child-bearing age.

Obviously, laws (or policies) of general applicability will impact some groups differently than others, if Congress could intervene any time State policies resulted in some sort of statistical imbalance among races, religions or sexes there would be no limit to Congressional power to interfere in local matters.

Since neither the family leave provision nor any of the other provisions of FMLA prevent or rectify a type of discrimination

prohibited by the Fourteenth Amendment, FMLA is not justifiable under "equal protection" even taken at its widest understanding.

Even granting that the enforcement powers cut a somewhat wider swath than is absolutely prohibited by the Fourteenth Amendment, if Congress had attempted to require pregnancy leave, for example, under the Fourteen Amendment even after this Court had so explicitly ruled that it was not an equal protection issue, that certainly seems to go to creating new constitutional rights, not enforcing old ones. Neither Congress nor the courts may create substantive constitutional rights in the name of equal protection (*San Antonio School Dist. V. Rodriguez*, 411 U.S. 1 (1973)).

IV Even if Sex Discrimination in employment were prohibited under the Fourteenth Amendment, and even if failure by a State to provide leave resulted in such discrimination, FMLA would still not be a reasonable and proportionate Congressional response because it does not counteract such alleged discrimination.

Both the Ninth Circuit and the government based much of their argument on the assertion that (as the government puts it):

> By setting a minimum standard for family leave for all eligible employees, the FMLA extends to men the types of leave benefits more often available to women and, at the same time, helps to eliminate the stereotype that only women[5] are responsible for family care-giving, while deterring employers from making hiring and promotion decisions based on stereotypes about how family responsibilities should be allocated (Government brief

[5] It is important to note the government's exaggeration of the alleged stereotype. Surely it is not the case that many people think that "ONLY women are responsible for family care-giving" thus the government and Ninth Circuit attack stereotypes which do not even exist.

urging denial of cert, sec. 4).

It is unlikely however that FMLA either helps overcome stereotypes, or diminishes employer fear of females disproportionately taking leave. These goals were based on unwarranted assumption, which have been exposed by the practice of FMLA, but should already have been known both through common sense and the experience of other countries.

In its Findings for FMLA Congress declared that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." Therefore, Congress would extend paternity leave to men in order to counteract this preference to higher men. The same reasoning presumably applies to family leave. By extending care-taking leave to men employers would allegedly have less reason to prefer men over women because of care-taking time off.

This reasoning, however, is based on the false assumption that if men and women are both "equally" afforded the "opportunity" to take leave, that men and women would take equal advantage of it. That is not the case, however. Women take leave under FMLA both far more often and for much longer periods of time.

The 1995 and 2000 government studies found that about 42% percent of FMLA users were men, (41.8 and 42.3% respectively). Given that men represent almost 60% of the full-time civilian workforce, those number grow even more out of proportion. The 40% of the workforce that is female is taking 60% of the leave. Thus a woman employee is about twice as likely to take leave as a male employee. Care-taking leave is even more disproportionate.

Personal sick leave provisions (which make up a little more than half of all FMLA leave, 52.4% in 2000) are probably invoked at approximately equal rates by men and women. That means that the maternity and care-taking provisions of FMLA are invoked by

a female employee about three times as often male. Maternity disability is less than 8% of leave in the 2000 study, but the longest in time. Since maternity disability is such a small percent of leave taken, women take care-taking leave far more often than men.

Moreover, women are not only far more likely to take leave, but also to take leave for much longer periods. Department of Labor statistics show that while many women take the full 12 weeks, or even longer for the birth of a child, most new fathers do not take FMLA leave at all, and when they do it is typically for only a few days, rather than many weeks or months typical of a new mother.

If Congressional intent in passing FMLA was to "dispel the myth" that women were more likely than men to take leave, then FMLA was not only a failure, but in fact, has actually tended to confirm it. When both men and women are given equal access to family and medical leave, a woman is far more likely to invoke leave than a men, and for far longer periods. Experts we consulted estimated that about 85% of FMLA leave (in terms of time taken) is taken by women.[6] Again, since women represent a significantly smaller part of the eligible full time workforce, a little over 40% of the workforce is taking 85% of the leave–a hugely disproportionate amount. Moreover, other countries which have granted leave on a gender neutral basis find that the vast majority of family leave is taken by women–typically about 85% of leave, and in some countries as much as 99%.

Several studies of European patterns point out the vast disparity between men and women in how leave is used. Sheila Kamerman writing in 2000 noted that even though family leave was offered on a gender neutral basis "only about 1 percent of fathers in Germany [and Austria] took advantage of the right to child rearing leave, less than 5 percent in Denmark and Finland,"

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[6] This figure was suggested in talks with Professor Zigler of Yale and Professor Kamerman of Columbia both recognized experts on FMLA.

and even when fathers did take leave "the actual portion of possible time that fathers used is quite low (about 11 percent)" (Kamerman, "Parental Leave Policies," in *Social Policy Report*, 2000, p. 9). Participation of new fathers in many European countries remains in the single digits. The only exceptions to this dismal rate of participation for fathers has been in a few Scandanavian countries where they have begun "requiring that fathers take at least a specified minimum part the leave" according to Kamerman. Kamerman concludes her study noting that "Coverage is extensive and take-up is high among women everywhere that the leave is paid, and the benefit level is adequate; but take-up remains modest for fathers everywhere except in Sweden. . . . Gender equity remains a goal even if largely unachieved" (Family Leave, 14)

The government's assumption that men and women would tend to make equal use of leave when offered family leave on the gender neutral basis is based on the assumption that men and woman will behave the same way when given the same opportunities.

So if, as the government argues, Congress went beyond the requirements of the Fourteenth Amendment in order to enact legislation that would counteract stereotypes, and discourage discrimination in employment, then clearly FMLA is not justifiable in terms of these goals since it has not accomplished them. In fact, it has reinforced the view that women use family leave far more than men.

If "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender" then just as surely a law which one gender makes use of disproportionately (by about 10 to 1 in terms of time off) also has "serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." FMLA seems to encourage the very thing it said it was trying to avoid.

In fact, this is another thing noticed in studying the

European experience. A study of the European leave policies conducted by Moss and Deven in 1999 concluded that extended family leaves required under European laws, which in some ways are intended to encourage women to have more children and spend more time with them, actually tended to reinforce the "stereotypical roles of women" as mothers first and workers second (cited in Kamerman, 10).

The two alleged goals of FMLA to some extent seem to be conflict with each other, in that, as it allows women to take off more time for care-taking, it encourages employers to view these woman as primary care-takers.

V. Even if FMLA were justifiable under the Fourteenth Amendment, that would not be sufficient to justify private suit in federal Court against States.

As in past briefs submitted by Coalition for Local Sovereignty for *Kimel v. Florida* and *Alabama v. Garrett*, we again respectfully suggest the Court take this opportunity to review its ruling in *Fitzpatrick v. Bitzer* (427 U.S. 445)–a review made all the more appropriate given that this case also deals with alleged "sex discrimination" issues.

Fitzpatrick remains the only time that this Court has permitted a suit against a State based on the theory that the Fourteenth Amendment over-rules the Eleventh. As such, *Fitzpatrick* is a unique and solitary departure from over 100 years of precedent with respect to the relation of the two amendments.

Fitzpatrick is surely one of the most remarkable decisions in Supreme Court history. Without any significant discussion of prior precedent, without any analysis of the history of the Fourteenth Amendment, and in the course of a remarkably short few pages the *Fitzpatrick* decision declared a part of the constitution effectively null and void under certain circumstances. It remains the only time in history that this Court has so ruled that one part of the constitution has implicitly been overruled by

another part.

The opinion cites only two prior cases to help justify its conclusion, but acknowledges that, "It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under 5 of the Fourteenth Amendment." Thus the opinion acknowledged the lack of prior precedent for its decision.

Immediately following this sentence the opinion goes on to set out the reasoning for concluding that Fourteenth Amendment overrules the Eleventh:

> But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see Hans v. Louisiana, 134 U.S. 1 (1890), are necessarily 'imited by the enforcement provisions of 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts (at 456).

This assertion is open to criticism on many fronts. As David Currie has written about it, "This reasoning is less than overwhelming. One might have thought that subsection 5, like other plenary grants of power, was subject to explicit and implicit

constitutional limitations, one would hardly read it to empower Congress to authorize cruel and unusual punishment [for violations of the amendment]." [Currie, *The Constitution in the Supreme Court* (Chicago, University of Chicago Press, 1990), 573]

The assertion that the provisions of the Eleventh Amendment are "necessarily limited by the enforcement provisions of 5 of the Fourteenth Amendment" simply defies all usual rules of legal interpretation, 100 years of precedent to the contrary and the explicit statements of many of the Framers of the amendment.

The Eleventh Amendment is certainly not "necessarily limited" by the Fourteenth as there are other possible ways of enforcing the amendment while not permitting suits against States, such as 1) private suits only against individual state officials, 2) suits by the federal government against States which violate the Fourteenth Amendment, and 3) review by this Court of state court decisions denying Fourteenth Amendment rights.

In fact, the debates of the Framers strongly suggest that these other means of enforcement were what was foreseen when the Fourteenth Amendment was put together. Rep. Bingham, for example, in expounding the effect of his first draft of the Fourteenth Amendment declared:

> The question is, simply whether you will give by this amendment to the people of the United States the power by legislative enactment to punish officials of States for violations of oaths enjoined on them by the Constitution. This is the question and the whole question. The adoption of the proposed amendment will take from the States no rights that belong to the States. (Globe, 1034)

This quote leaves little doubt that Bingham believed that the enforcement powers of the amendment would work against individual state officers, rather than against States as such. This view is further buttressed by the fact that such was the view of this Court for over an entire century following ratification of the

Fourteenth Amendment.

One of the most explicit statements of this by the Court is found in *Ex Parte Young* (209 U.S. 123, at 149), where the Court declared:

> The 11th Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another state or citizens or subjects of any foreign state. The 14th Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws. The case before the circuit court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may assume that each exists in full force, and that we must give to the 11th Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.

Such an interpretation is the only one in line with standard rules of interpretation. When two provisions of law are being considered they always should be interpreted, if possible, in such a way as to give both full effect, and one should not be regarded as invalidating the other unless there is no other rational way of interpreting them. Such is surely not the case with the Eleventh and Fourteenth Amendments. Despite clear hostility of this Court at various times to the Eleventh Amendment, and attempts such as *Parden v. Terminal Railway* (377 U.S. 184) to reduce the scope of

the Eleventh Amendment, both Amendments were still understood to exist side by side.

Finally, the "implicit" over-ruling of the Eleventh Amendment by the Fourteenth runs contrary to all of this Court's recent discussions on the need for Congressional enactments to be explicit and unequivocal to nullify Eleventh Amendment immunity.

It has become well established doctrine that at a minimum Congress must have "unequivocally expresse[d] its intent to abrogate the immunity," *Seminole Tribe* (517 U.S. 44), citing *Green v. Mansour*, 474 U.S. 64, 68 (1985); and *Seminole Tribe* went on to declare (at 54):

> Congress' intent to abrogate the States' immunity from suit must be obvious from "a clear legislative statement." Blatchford, 501 U.S., at 786 . This rule arises from a recognition of the important role played by the Eleventh Amendment and the broader principles that it reflects. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 - 239 (1985); Quern v. Jordan, 440 U.S. 332, 345 (1979). In Atascadero, we held that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."

If such a strict standard is applied to ordinary legislation, we fail to comprehend how any lesser standard could be applied to constitutional provisions themselves. Should not any conclusion the Fourteenth Amendment was intended to abrogate Eleventh Amendment immunity also be required to be unequivocally expressed and require a "clear legislative intent?" It seems very likely that "a general authorization" such as "Congress shall have power to enforce by appropriate legislation," can only be regarded as "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."

In this regard it is also worthwhile to remember "the 'old and well-known rule that statutes which in general terms divest pre-

existing rights or privileges will not be applied to the sovereign without express words to that effect," *United States v. Mine Workers*, 330 U.S. 258, at 272.

Not only common sense tells us that at least the same sort of clarity ought apply to constitutional law as to statutory law, but also repeated statements of this Court have further driven home that point.

Chisolm v. Georgia noted that "A State retains all of its sovereignty unless there is *specific and explicit* cession of the that sovereignty." Two centuries later in *Alden* (also citing *Blatchford*) this Court noted that "Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the Constitutional design" (at II)

The *Fitzpatrick* decision cites no "completing evidence" nor any "specific and explicit" cession of sovereignty, it offers no more than an assertion that the Fourteenth Amendment was designed to effect a "fundamental shift" in State/federal relations. There is ample room for debate about whether the framers sought such a fundamental shift, but even if one accepts that it did, it is still a mere assumption that such a shift included the ability for private citizens to sue States in federal court.

The Eleventh Amendment, on the contrary is "specific and explicit" about what federal courts may not do. To overrule a "specific and explicit" provision by appeal to the "implied powers" of another amendment simply strains every rule of legal interpretation. Indeed, as Alexander Hamilton declared in Federalist 81 on this very question, "to ascribe to the federal courts, by mere implication, and in destruction of pre-existing right of state governments, a power which would involve such a consequence, would be altogether forced and unwarranted."

As this Court ruled in 1921:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given" (*In Re New York* (256 U.S. 490 at 497)).

It seems inexplicable to us that such a "fundamental rule of jurisprudence" could be set aside so easily "by mere implication."

Finally, while several recent decisions (*Seminole Tribe, Florida Prepaid, Alden, University of Alabama*) have repeated the *Fitzpatrick* view that the Fourteenth Amendment can validly abrogate the Eleventh Amendment, that view was ultimately irrelevant to the decisions, since none of these recent cases has concluded that the *Fitzpatrick* doctrine was applicable. That would make the restatement of the *Fitzpatrick* doctrine mere dicta in these cases. *Fitzpatrick* itself remains a unique ruling of the Court unprecedented both before and after.

This Court has not hesitated to overturn Eleventh Amendment precedents of *Parden* and *Union Gas* which were clearly wrong. We believe that *Fitzpatrick* is similarly unsupportable by sound constitutional interpretation. Even if this Court does not overturn *Fitzpatrick* in the present case, we can only urge that any extension or application of the *Fitzpatrick* doctrine would be highly inappropriate.

CONCLUSION

This Court's decision in *City of Beorne v. Flores* took a giant step in protecting local governments from undue Congressional interference. One reason that decision was so powerful was that it actually took time to consider the historical meaning of the Fourteenth Amendment. *Florez* emphasized that

the Fourteenth Amendment was intended to accomplish only limited objectives, and not to grant Congress general power to legislate broadly on any matter affecting life, liberty or equality:

> Members of Congress from across the political spectrum criticized the [original version of the] Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. . . . Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution. (521 U.S. 507)

To uphold FMLA as a valid enactment of Congress would truly be to "work an entire change in our form of government." It would convert the Fourteenth Amendment into a general grant of authority for Congress to go well beyond the substantive requirements of the Amendment and legislate generally on almost any subject.

To avoid this result we urge this Court to stay as close as possible to the original understanding of the Fourteenth Amendment as so ably demonstrated by Justice Kennedy in his majority opinion in *Flores*. We believe that history (and this Court's subsequent interpretation) makes clear three important facts, 1) the framers never intended for "sex discrimination" to be a specially suspect action under the amendment, 2) there is no evidence that they regarded the Eleventh Amendment as contradictory to the new amendment, and 3) the amendment was intended to be no more than remedial for a few specific problems, not to grant Congress plenary power to legislate broadly.

Just as *Flores* concluded that RFRA had been "a considerable congressional intrusion into the States' traditional prerogatives," FMLA threatens the same type of intrusion, first

from Congress under an expanded view of the Fourteenth Amendment, and secondly, from federal courts, as States will be called upon regularly to defend themselves from suit in federal court for the most basic employment decisions.

While States' ability to be free from federal suit in decisions about leave policies may not in itself seem to be a very great invasion of State sovereignty the principal remains one of central importance, something this Court has called "a fundamental rule of jurisprudence" (*In Re New York*).

Such fundamental constitutional provisions should not be lightly cast aside.

For these reasons we urge that the Court of Appeals decision be reversed.

Respectfully submitted,

Kenneth B. Clark, Counsel of Record

OCT 25 2002

No. 01-1368

IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS AND UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

(Additional *Amici* Listed on Inside Cover)

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Disability Rights Education and Defense Fund, Inc.
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Equal Rights Advocates
Feminist Majority Foundation
Mexican American Legal Defense and Educational Fund
NARAL Foundation
National Association of Protection and Advocacy Systems
National Council of Jewish Women
National Council of Negro Women
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Health Law Program
National Organization for Women Foundation
9to5, National Association of Working Women
Northwest Women's Law Center
Older Women's League
People for the American Way Foundation
Women Employed
Women Work! The National Network for Women's Employment
Women's Law Project

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INTEREST OF AMICI CURIAE[1]

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated since 1972 to the advancement and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Enactment and enforcement of effective family and medical leave laws and policies is central to NWLC's goal of securing equal opportunity for women in the workplace, and NWLC has been a strong supporter of the Family and Medical Leave Act since its conception. NWLC is joined in filing this brief by 31 organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans, including policies that enable women and men to meet their family responsibilities without detriment to their job security. The individual organizations are described in the attached appendix.

SUMMARY OF ARGUMENT

Repeatedly over the past thirty years, this Court has held unconstitutional state laws and practices premised on archaic views of the proper roles and "natural" tendencies of men and women. As the Court has recognized, gender stereotypes and gender discrimination are tightly linked: gender stereotypes are both a result of historical discrimination and a source of continued discrimination. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Using the judicial tools at its disposal, the Court has addressed this discriminatory dynamic by applying heightened scrutiny to ensure that state gender classifications do not reflect and reinforce sex-role stereotypes. *See United States v. Virginia*, 518 U.S. 515 (1996).

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and nobody other than *amici*, their members, or their counsel contributed monetarily to the brief.

Congress has complemented the Court's effort with the legislative tools uniquely within its province, including most recently the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 ("FMLA" or "Act"). The FMLA is aimed at eliminating gender stereotypes and associated gender discrimination in a setting – the workplace – in which they are especially persistent and damaging. By requiring a minimum amount of unpaid family caretaking leave, the FMLA counteracts the tendency of employers to make employment and leave decisions based on traditional assumptions about the division of caretaking and workplace roles along gender lines. And by insisting that such leave be made available on a gender-neutral basis, the FMLA precludes discriminatory leave decisions premised on overgeneralizations about the natural caregiving proclivities of men and women.

Because it is targeted at gender stereotypes that are both a cause and a product of unconstitutional gender discrimination, the FMLA falls squarely within Congress' traditional authority under § 5 of the Fourteenth Amendment. *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Congress was not required to make extensive legislative findings in support of its § 5 authority. This Court's own extensive case law invalidating state practices because they rest on gender stereotypes provides an ample record here.

Congress' authority under § 5 extends to abrogating state sovereign immunity from monetary liability. The provisions of the FMLA allowing for back-pay and damages are both carefully limited and absolutely critical to the statute's effective enforcement. As with other civil rights statutes, only monetary relief can make employees whole who are injured by unlawful deprivations of their rights and provide employers with incentives to comply with the law.

Gender stereotypes and discrimination are as persistent as they are harmful. The Court should not have to take them

on alone. Through enactment of the FMLA, Congress, too, can help to "find new ways to balance family and professional responsibilities between men and women, recognizing gender differences in a way that promotes equality and frees both women and men from traditional role limitations." Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U.L. Rev. 1546, 1557 (1991).

ARGUMENT

I. THIS COURT HAS RECOGNIZED THE DIRECT LINK BETWEEN GENDER STEREOTYPES AND UNCONSTITUTIONAL GENDER DISCRIMINATION.

A. The Problem of Gender Stereotyping and Gender Discrimination.

1. The tendency to act on the basis of gender stereotypes is more than an unfortunate social phenomenon. It is also a legal problem. As this Court has recognized repeatedly over the past thirty years,[2] fixed notions regarding the "natural" roles of men and women – with women "destined solely for the home and the rearing of the family," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), and men's proper role "not that of homemaker but rather that of the family breadwinner,"

[2] Before the 1970s, the Court itself routinely accepted and relied upon stereotypes regarding the proper roles of men and women in considering gender classifications. *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. (Wall. 16) 130, 141 (1873) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) ("That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious."); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (concluding that "bartending by women," but not men, may "give rise to moral and social problems"); *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) ("[W]oman is still regarded as the center of home and family life.").

Weinberger v. Wiesenfeld, 420 U.S. 636, 653 n.20 (1975) – are inextricably linked to our nation's "long and unfortunate history of sex discrimination." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994).

The relationship between gender stereotyping and unconstitutional gender discrimination is mutually reinforcing – which helps to explain why both the stereotyping and the discrimination have proven so durable. On the one hand, gender stereotypes lend support to unconstitutional gender classifications, as women and men are excluded from certain opportunities because of preconceived assumptions about their natural proclivities. At the same time, unconstitutional gender classifications help to keep stereotypes alive; the absence of men or women from a given field reinforces stereotypes about the innate abilities and preferences of men and women.

The Court addressed precisely this discriminatory dynamic in *Mississippi University for Women v. Hogan*. At issue in *Hogan* was a Mississippi law that expressly barred men from enrolling in its state-supported nursing school. The state defended its women-only policy as a form of "compensation" for prior discrimination against women. The Court, however, focused on references in the university's charter to training women in the "practical affairs of life," such as domestic and caretaking tasks, along with other traditionally "feminine" pursuits. 458 U.S. at 720 n.1 (quoting Miss. Code Ann. § 37-117-3 (1972); *id.* at 730 & n.16. According to the Court, the state's admissions policy impermissibly rested on traditional sex-role stereotypes – and, at the same time, gave "credibility to the old view that women, not men, should become nurses." *Id.* at 730. The vicious cycle, that is, worked just as described above: the women-only nursing school both derived from and helped to perpetuate gender stereotypes, "mak[ing] the assumption that nursing is a field for women a self-fulfilling prophecy." *Id.*

2. Gender discrimination linked to stereotypes arises in a number of contexts. *See infra* note 4. But the problem is especially acute in the workplace, where the archetypal "male" role of worker and breadwinner may come directly into conflict – or be perceived as in conflict – with the archetypal "female" role of childbearer and caretaker. Because those particular stereotypes are so deeply entrenched, *see Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), there is a special risk that both men and women will find their workplace choices constrained by outmoded views of what is and is not gender appropriate.

More specifically, both men and women confront a strong if sometimes unspoken expectation that women should and will prioritize domestic over workplace responsibilities – and that men should not and will not. That expectation makes itself felt in a whole range of workplace decisions, including hiring, *see Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (refusal to hire women with children), and work assignments, *see International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (refusal to assign certain work to women of child-bearing years). Most important here, it is reflected in decisions granting and withholding discretionary family and medical leave. *See Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (refusal to grant parenting leave to male employee).

Workplace practices like these have an immediate and direct impact on the employment opportunities of women, as well as on the ability of men to serve a caretaking function. They also operate less directly – but no less importantly – to perpetuate both gender stereotypes and future gender discrimination. When women, or a subset of women, are excluded from certain fields, that reinforces the impression that those fields are inherently "male" and unsuited to the "female" nature. *Cf. Hogan*, 458 U.S. at 730 (exclusion of men from nursing school reinforces stereotype that women are

inherently better suited for nursing profession). If women with children are barred from, say, jobs that require travel, *cf. Phillips* (denying jobs to women with children), then the absence of women fosters the impression that those jobs are incompatible with an essentially female childrearing role. That impression, in turn, may make women less likely to pursue careers in those fields – and employers less likely to hire them even when they do, and even when they are equally or better qualified than male applicants. *See* John E. Williams & Deborah L. Best, *Measuring Sex Stereotypes: A Multination Study* 294 (1990) ("[S]ex stereotypes create a barrier whenever persons of one sex seek entry into an occupation that has traditionally been occupied primarily by members of the other sex."). Instead, women more often than men work in positions that seem compatible with caretaking responsibilities: jobs that give workers greater freedom to take time off for domestic responsibilities, and that pay less as a result. *See* Laura A. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Reform 371, 385-86 (2001) ("Women are more likely than men either to accept voluntarily or to be funneled into lower paying 'mommy-track' professional jobs and noncommissioned retail work" and temporary workers are more likely to be women).[3]

[3] *See also, e.g.*, Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 81 (2000) ("Nearly 60 percent of women hold jobs in traditional women's work such as clerical, sales, and service occupations, which typically pay half to two-thirds of the wages in blue-collar craft work."); Eliza K. Pavalko & Julie E. Artis, *Women's Caregiving and Paid Work: Causal Relationships in Late Midlife*, 52B J. Gerontology: Soc. Sci. S170 (1997) (care of elderly, ill or disabled family members or friends is disproportionately done by women; care often coincides with peak of women's labor force participation, causing many women to reduce hours or stop working altogether).

Likewise, men may be discouraged from seeking jobs in these "women's" fields, even when they otherwise would be attracted to positions affording them flexibility to spend more time at home and with family. *See* Williams & Best, *supra*, at 294. In any job, they may be reluctant to request family leave time because of concerns, real or perceived, that transgressing traditional gender norms will have negative consequences for their careers. *See* Catalyst, *Report on a National Study of Parental Leaves* 65-66 (1986), *reprinted in The Parental & Med. Leave Act of 1986: Joint Hearing Before the House Subcomm. on Labor-Mgmt. Relations & the Subcomm. on Labor Standards of the Comm. on Educ. & Labor*, 99th Cong. 210-11 (1986) [hereinafter 1986 Catalyst Study] (41% of surveyed employers admitted that they believed it was unreasonable for men to use paternity leave offered them); U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 8 (1996) [hereinafter 1996 DOL Report] ("[M]en who do take substantial periods of leave often face significant negative consequences and stereotyping when they return to work."); *see also* Br. of *Amicus Curiae* Pacific Legal Found. 24 [hereinafter PLF Br.] ("[M]en are reluctant to take leave for family reasons because of the detrimental effect on their careers.").

As a result, working women, rather than their spouses or other male family members, more often assume primary or full responsibility for family tasks, as well as the associated burdens on their employment opportunities. This is true not only with respect to the care of young children, but also for care of ill or elderly family members. *See* 1996 DOL Report at 7; Angie Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 Mich. J. Gender & L. 113, 151 (1998) (women disproportionately assume responsibility for caregiving of elderly parents and parents-in-law and "such

caregiving restricts women's employment opportunities just as child care does"); *Family Caregiving in the U.S.: Findings from a National Survey* 8, 11 (sponsored by AARP and National Alliance for Caregiving, 1997), *available at* http://www.caregiversmarketplace.com/articles.cfm (73% of those caring for elderly relatives and friends are female, and 61% of female caregivers are employed).

B. The Judicial Response to Stereotyping and Associated Gender Discrimination.

1. It is the connection between gender stereotypes and sex inequality that has led this Court to apply heightened scrutiny to gender classifications. Heightened scrutiny is necessary, the Court has explained, because there is such a strong likelihood that gender classifications are premised on "archaic and overbroad generalizations about gender or [are] based on outdated misconceptions concerning the role of females at home rather than in the marketplace and world of ideas." *J.E.B.*, 511 U.S. at 135 (internal quotations and citations omitted). And in part because gender classifications that reflect stereotypes also perpetuate them, such classifications are deemed unconstitutional gender discrimination. *Id.* at 131 (gender discrimination violates Equal Protection Clause "particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women").

Heightened scrutiny is the tool the Court uses to identify those gender classifications that rest on gender stereotypes and are therefore unconstitutional. By requiring a direct and "substantial" link between the goal of a statute and the gender classification used to achieve that goal, *see Hogan*, 458 U.S. at 724, the Court assures "that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and

women," *id.* at 725-26. And by requiring that the classification advance an "important" state interest, the Court imposes on the State the burden of showing that the purpose behind a classification is not based on stereotypical notions regarding the proper roles of men and women. *See id.* at 730.

Under this searching scrutiny, a gender classification that rests on a sex-role stereotype is unconstitutional even when that stereotype is, as a general matter, factually supportable. That is, the harm done by gender stereotyping is so serious that even a statistically "true" generalization may not be the predicate for state action. *See, e.g., Craig v. Boren*, 429 U.S. 190, 201-02 (1976). Regardless of the general descriptive power of a stereotype, the failure to recognize individual identity over a person's status as a member of a gender group is constitutionally unacceptable. *See United States v. Virginia*, 518 U.S. at 532-33; *Nguyen v. INS*, 533 U.S. 53, 83 (2001) (O'Connor, J., dissenting); *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring).

2. Since it began applying this heightened standard to gender classifications in the 1970s, the Court has invalidated a host of state laws on the grounds that they are premised on stereotypes about the natural proclivities of men and women. The propensity of States to act in reliance on gender-role stereotypes caused the "statute books gradually [to] be[come] laden with gross, stereotyped distinctions between the sexes." *Frontiero*, 411 U.S. at 685. Under the standard described above, those statutes and other state classifications based on stereotypes have been judged by this Court to constitute gender discrimination in violation of the Fourteenth Amendment.[4]

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[4] *See, e.g., J.E.B. v. Alabama*, 511 U.S. 127 (1994) (state attorney use of peremptory challenges to remove jurors on basis of sex); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (refusal to admit men to state nursing school); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (Lou-

As the case load of the federal courts demonstrates, gender stereotyping by the States remains a problem today. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (Virginia state university's refusal to admit women); *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (Maryland troopers' denial of family leave to male employee on account of sex); *Arkin v. Oregon*, No. 6:96CV6327 (D. Or.) (filed Dec. 19, 1996) (female faculty member allegedly denied tenure because she had taken maternity leave); *Zimmerman v. Regents of the Univ. of Cal.*, No. 3:99CV4108 (N.D. Cal.) (filed Sept. 7, 1999) (business school's admissions policy challenged as discriminating against women with children). Indeed, the Court takes a kind of judicial notice of that fact when it continues to subject gender classifications to heightened scrutiny, *see, e.g.*, *Nguyen*, 533 U.S. at 60.

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isiana statute giving husband but not wife unilateral right to dispose of jointly owned community property); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (Missouri workers' compensation laws denying widowers but not widows benefits unless they are mentally or physically incapacitated or dependent on spouse's earnings); *Caban v. Mohammed*, 441 U.S. 380 (1979) (New York domestic relations law permitting unwed mother but not unwed father to block adoption of their child); *Orr v. Orr*, 440 U.S. 268 (1979) (Alabama alimony statute requiring that men but not women pay alimony after divorcing); *Duren v. Missouri*, 439 U.S. 357 (1979) (Missouri law permitting automatic exemption from jury service for women requesting it); *Craig v. Boren*, 429 U.S. 190 (1976) (Oklahoma statute prohibiting sale of 3.2% beer to men under 21 and to women under 18); *Stanton v. Stanton*, 421 U.S. 7 (1975) (Utah statute extending period of minority to age 21 for males but only to age 18 for females); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (Louisiana state practice of permitting women to be called for jury service only if they previously file a written declaration of desire to serve); *Stanley v. Illinois*, 405 U.S. 645 (1972) (Illinois statute permitting State to assume custody of children of unwed fathers but not unwed mothers without hearing on parental fitness or proof of neglect); *Reed v. Reed*, 404 U.S. 71 (1971) (Idaho probate code preferring men over women for appointment as administrator of a decedent's estate).

II. THE FMLA REMEDIES GENDER DISCRIMINATON BY WORKING TO ERADICATE THE STEREOTYPES THAT ARE BOTH A CAUSE AND A RESULT OF THAT DISCRIMINATION.

The FMLA is but the most recent in a long line of congressional efforts[5] aimed at the "compelling purposes" of eliminating gender-role stereotyping and associated gender discrimination. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (state interest in eradicating gender discrimination is "compelling"). The provisions of the FMLA work independently and in concert to achieve these purposes by undermining the most traditional and entrenched gender stereotypes in the context – the workplace – in which they are most likely to do harm.

Congress enacted the FMLA to "promote the goal of equal employment opportunity for women and men pursuant to [the Equal Protection Clause of the Fourteenth Amendment]." 29 U.S.C. § 2601(b)(5). Like this Court, Congress recognized that equal employment opportunity depends on elimination of gender stereotypes in the workplace, and understood that gender-based generalizations fuel gender discrimination. *See, e.g.*, *id.* § 2601(a)(5) ("[D]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women."); *id.* § 2601(a)(6) ("[E]mployment standards that apply to one gender only have serious potential to discriminate against employees and applicants for employment who are of that gender.").

Toward the end of eliminating gender stereotypes and associated gender discrimination, the FMLA operates, first, to

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[5] *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k); Equal Pay Act, 29 U.S.C. § 206(d)(1).

ensure that a minimally necessary amount of unpaid family caretaking leave is available. *See id.* § 2612(a)(1)(A)-(C).[6] As discussed below, that leave entitlement serves to counteract the tendency of employers to provide inadequate amounts of family leave in reliance on stereotypes regarding the gendered division of labor within families. Second, the FMLA ensures that such leave is provided to all employees on a gender-neutral basis. *See id.* §§ 2611, 2612. Providing gender-neutral leave further remedies the tendency of employers to make discriminatory leave decisions based on gender stereotypes. Finally, the FMLA provides employees with a monetary remedy, *see id.* § 2617(a), to ensure that its substantive provisions are effectuated.

A. Job-Protected Leave Is Necessary to Prevent Discrimination Based on Gender Stereotypes.

By mandating that some job-protected caretaking leave be made available to workers, the FMLA works to remedy the most traditional of all gender stereotypes: that domestic and workplace responsibilities are divided along gender lines. That stereotype – according to which (male) employees need no leave because their (female) spouses are at home full-time – is sharply out of step with present-day reality: a majority of households have no family member able to take care of domestic responsibilities full-time.[7] As Congress

[6] Specifically, leave is guaranteed when necessary to care for a newborn, § 2612(a)(1)(A), adopted or foster child, § 2612 (a)(1)(B), or family member with a serious health condition, § 26(a)(1)(C). Because those provisions all serve the same sex-equality end and are all valid on the same rationale, this brief treats them together under the rubric of "caretaking" or "family" leave. To resolve this case, however, the Court need only decide whether § 2612(a)(1)(C) may be the basis for a damages action against a State.

[7] At the time the FMLA was enacted, both spouses worked outside the home in 60% of families. *See Family and Medical Leave Act Poster and Background Paper*, Daily Lab. Rep. (BNA), No. 141, at E-2 (July 26, 1993). Moreover, "[a]pproximately 23 percent of all workers with families [had] no spouse in the household to share wage-earning or caregiving responsibilities – and women [] account[ed] for about 80 percent of that group." *See* 1996 DOL Report at 5.

found in connection with the Act, "[t]he typical worker is no longer a man supporting a wife who stays at home, with the woman caring for the children and tending to other family needs." H.R. Rep. No. 103-8, at 16 (1993). The FMLA's caretaking leave provisions amount to a statutory requirement that employers cease discriminating against both male and female workers by continuing to rely on outdated stereotypical notions about sex-based divisions of family labor. *Id.* at 17 ("our workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities"); 137 Cong. Rec. H9714 (1991) (statement of Rep. Clay) (no-leave policies based on "so-called traditional family, in which the father went to work while the wife stayed home to raise the kids").

The denial of job-protected caretaking leave in reliance on this overgeneralization disproportionately burdens women. Women continue to bear more responsibility than men for domestic duties, in part because they continue to earn less than men in the workplace. Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 Geo. L.J. 1903, 1916 (1994) (because men generally earn more than women, often "the only rational economic decision" is for the mother to leave the workforce for reasons relating to parenthood); The FMLA of 1991: Hearing on H.R. 2 Before the Subcomm. On Labor-Management Relations of the House Comm. On Education and Labor, 102d Cong. 128 (1991) (statement of AARP) (same). As a result, when job-protected caretaking leave is not available, it is women more than men who must make adjustments that allow for their home responsibilities –

either by moving to jobs that do offer leave, reducing their hours, or withdrawing from the paid workforce altogether. *See* Deborah Rhode, *Justice and Gender* 174 (1989) (at time FMLA was first considered, "[o]ver half of all working women, but only 1 percent of working men, ha[d] reported dropping out of the work force at least once for family reasons."); Pavalko & Artis, *supra*, S170.

Those adjustments have long-term financial consequences for both women and their families. Another stereotype behind the denial of job-protected leave is that women's income is merely "supplemental" to that of their husbands', and that job security is therefore less important to women than to men. In fact, women's employment income has become increasingly critical to family economic stability. And that income suffers dramatically when women are forced to leave their jobs altogether to care for children or other family members. When they finally return to the paid workforce, such women have "substantially lower annual earnings" and suffer greater long-term losses in their retirement income than women who can take job-protected leave. 1996 DOL Report at 52; Kessler, *supra*, at 387; Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, Monthly Lab. Rev., Sept. 1995, at 15 (women who leave labor force for family responsibilities often return to "much lower" earnings than women who do not leave labor force and have comparable levels of work experience). Indeed, continuity in the paid workforce is so important to women's economic security that it is estimated that even unpaid job-protected maternity leave would close up to 43 percent of the salary gender gap for affected women. 1996 DOL Report at 53 (citing Jane Waldfogel, *The Family Gap for Young Women in the U.S. and UK: Can Maternity Leave Make a Difference* (Kennedy School of Gov't, Harvard University, May 1994)).

The fact that women are more often forced to leave work

in order to perform caretaking tasks is itself a product of gender stereotypes and associated discrimination. But the failure of employers to provide job-protected leave also causes the entrenchment and perpetuation of those same stereotypes. That women regularly must leave the workforce in order to fulfill caregiving responsibilities only enhances the impression that women are specially suited for the domestic role – and less suited than men to the paid workforce. In short, the full discriminatory dynamic that this Court has recognized and condemned, *see Hogan*, 458 U.S. at 730, plays out in connection with the denial of caregiving leave.

By providing a right to job-protected leave in situations where caretaking tasks arise, Congress combats that pernicious dynamic. Providing a minimum leave entitlement allows women to fulfill domestic duties without being forced to leave their jobs – and, at the same time, allows men to take on greater domestic duties. Only in that way can Congress interrupt the vicious cycle of stereotyping and discrimination that results when women, and not men, are forced to leave the workforce in order to assume the caretaking role they have historically been assigned.[8]

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[8] The personal disability, or pregnancy, provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), operates similarly, preventing employers from forcing women out of the workplace because of stereotypical notions about pregnancy. *Cf. Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634 (1974) (evaluating constitutionality of policies mandating that expectant mothers cease working several months before their expected due dates). Though it is framed in terms of disability, this provision should not be confused with provisions of the Americans with Disabilities Act (ADA) considered in *Garrett v. University of Alabama Board of Trustees*, 531 U.S. 356 (2001). The fact that Congress used non-pregnancy specific language in the FMLA reflects a longstanding congressional commitment to treating all disabilities, including pregnancy, equally and in a gender-neutral manner. *See, e.g.*, Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). Unlike the provisions of the ADA, the FMLA's pregnancy provision is directly motivated by and responsive to discrimi-

B. A Gender-Neutral Leave Entitlement Is Required to Prevent Discrimination Based on Gender Stereotypes.

The FMLA does more than guarantee job-protected caretaking leave; it guarantees that leave to men as well as women. As this Court has recognized, gender stereotypes harm both sexes. Such overgeneralizations can lead to discrimination against men or women or both. *See, e.g., Orr*, 440 U.S. at 279 ("The fact that the classification expressly discriminates against men rather than women does not protect it from [heightened] scrutiny."). The gender-neutral requirement of the FMLA is essential to remedy such discrimination, both by making discriminatory leave practices illegal and by undermining the viability of the stereotypes that support them.

Men have long faced discrimination and unequal opportunities with respect to caretaking leave. *See* 1986 Catalyst Study at 210-11 (63% of companies do not believe it is reasonable for men to take any parental leave at all; among companies offering paternity leave, 41% believe it is unreasonable for men to use it); 1996 DOL Report at 171 (69% of worksites had to change their policies to provide family leave to male employees in order to comply with FMLA). The States are no exception. *See Knussman*, 272 F.3d at 630 (male state trooper told that child's mother would have to be "in a coma or dead" for him to be granted caretaking leave).

Making leave available in a gender-neutral manner directly addresses discrimination based on the stereotypical notion of women as "natural" caretakers. *See id.* at 629-30. At the same time, it works to undermine the stereotypes that underlie the discrimination, encouraging male employees to

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nation against women disabled by pregnancy. Of course, the pregnancy provision is not directly implicated by the facts of this case.

take leave and their employers to view male leave-taking as acceptable. As one of petitioners' own *amici* explains, "The gender-neutral language of the FMLA is intended to make it more acceptable for men to take family leave despite strong cultural (and many individual) preferences for women to assume caretaking roles in two-parent households." PLF Br. at 24. The FMLA has succeeded in enabling men to take family leave. *See* Rosemarie Feuerbach Twomey & Gwen E. Jones, *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 Employee Rts. & Emp. Pol'y J. 229, 240 (1999) (statistically significant increase in percentage of men who requested leave between 1992 and 1998). As even more men take advantage of the caretaking leave to which they are now entitled, the stigma of taking leave in order to do "women's work" will dissipate still further. *See* Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 Am. U. J. Gender & Law 39, 49-50 (1994) ("By granting both female and male employees the right to family and medical leave, the FMLA may help to change society's perception of child care, elder care, and other dependent care as 'women's work.'").

Providing that opportunity to men also works to remedy discrimination against women. When men take family leave, it helps to reduce women's disproportionate caretaking burden and thus enhances women's workplace options. Male leave-taking also combats the tendency of employers to presume that women are the primary caretakers and, as such, less likely than men to be dependable and responsible workers. Relatedly, providing men with an equal entitlement to leave minimizes the risk that employers will prefer male candidates on the assumption that men, unlike women, will not require or take leave for domestic caretaking tasks. *See* 29 U.S.C. § 2601(a)(6) ("[E]mployment standards that apply to one gender only have serious potential to discriminate

against employees and applicants for employment who are of that gender.").

None of these gains for workplace equality could be achieved with a gender-*specific* leave provision, one that applied to women but not men. Indeed, a women-only leave entitlement would be counter-productive in important ways, codifying and perpetuating the stereotype that women are specially suited for caretaking responsibilities. Only by providing the same leave entitlement to all workers could Congress give both men and women the opportunity and incentive to make decisions without regard to their gender or associated role-typing. This has the immediate effect of broadening the opportunities available to both men and women: when decisions may be based on an individual worker's particular situation and aptitudes, more men and fewer women will take leave in order to perform domestic tasks. *See* Twomey & Jones, *supra*, at 240 (statistically significant increase in percentage of men requesting caretaking leave after enactment of FMLA); *compare* 1996 DOL Report App. E, at 267 *with* David Cantor *et al.*, U.S. Dep't of Labor, *Balancing The Needs of Families and Employers* App. A-2, at A-2-5 (2000) (showing increase in percentage of male leavetakers taking paternity leave, from 14.5% in 1995 to 22.8% in 2000). It also provides a future benefit through the corresponding reduced propensity of employers to associate domestic tasks exclusively with women, and to make employment decisions based on that stereotype.

C. The Availability of Monetary Relief Is Crucial to Enforcement of the FMLA.

Contrary to the picture painted by petitioners, a ruling that the FMLA does not abrogate the States' immunity from monetary liability would have serious and dramatic consequences for enforcement of the statute. The monetary awards available under the FMLA are carefully circumscribed and consist mainly of equitable relief in the form of back-pay. That limited monetary relief is absolutely necessary to the effective operation of the Act.

The same is true of any number of other civil rights statutes. Indeed, Congress included a damages remedy in the FMLA for precisely the same reasons it allows back-pay awards under other employment-related civil rights statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* Congress included back-pay remedies in those laws to ensure both that employees injured by unlawful deprivations of their rights would be made whole, and that employers would have an incentive to comply with the law. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975). Congress had in mind the same "twin statutory objectives" when it enacted the FMLA's monetary damages provision. *See* H.R. Rep. No. 100-511 pt. 2, at 44-45 (1988); S. Rep. No. 100-447, at 46-47 (1988); H.R. Rep. No. 101-28, pt. 1, at 37 (1989); S. Rep. No. 101-77, at 47-48 (1989).

Only monetary relief can make whole an employee who is deprived of FMLA-protected rights. The injunctions offered up by petitioners as a substitute, *see* Pet. Br. 20, are wholly inadequate. Imagine a state employee who asks for and is illegally denied job-protected leave to take care of an ailing parent. Her choices are two: she can leave her job to assume her caretaking responsibilities, or she can forgo her caretaking responsibilities in order to keep her job. In neither case can injunctive relief make her whole. If she leaves her job (or takes what she thinks is job-protected FMLA leave only to lose her job), an injunction reinstating her after lengthy litigation cannot compensate her for the salary she would have earned, or for other out-of-pocket expenses – for example, medical expenses – that she may incur while the judicial process runs its course. If she stays in her job – the

"choice" that will be forced on most employees by financial necessity – an injunction does no good at all. FMLA caretaking leave is by its nature time-sensitive, and court-ordered leave that comes only after an elderly parent has recovered – or perhaps died – is beside the point. The only meaningful remedy is reimbursement for the cost of hiring a caretaker during the time when the employee was entitled to be at home.

Nor can it be assumed that injunctive relief will be available whenever a state employee has been deprived of FMLA-protected rights. The individual circumstances of many such cases may preclude injunctive relief altogether. *See, e.g.*, *Dawson v. Leewood Nursing Home, Inc.*, 14 F. Supp. 2d 828 (E.D. Va. 1998) (no reinstatement when wrongfully terminated employee has become incapacitated by illness and is unable to return to work); *Miller v. AT&T*, 83 F. Supp. 2d 700, 708 (S.D.W. Va. 2000) (reinstatement might be inappropriate in an FMLA case when the employer-employee relationship is so hostile that there is no longer any possibility of a productive and amicable relationship); *cf. Pollard v. E.I. DuPont de Nemours & Co.*, 532 U.S. 843 (2001) (same, in Title VII case). In short, injunctive relief falls far short of promising to make state employees whole when they are illegally denied FMLA leave.

Injunctive relief is similarly inadequate with respect to employer incentives. Without the prospect of monetary liability, States would have no real incentive to comply with the FMLA. For one thing, they would know that the absence of a monetary remedy makes it unlikely that employees will sue even if their rights are violated: very few employees will undertake the difficulties of litigation if they know that they cannot be made whole if they prevail, and still fewer if they cannot recover attorneys' fees and litigation costs. *Cf. Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986) ("There is little incentive for a plaintiff to bring a Title

VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves . . . ."). And even if an aggrieved employee did sue for injunctive relief, the worst-case scenario for the employer would be an order of reinstatement – leaving the State no worse off than if it had complied in the first instance, and with a windfall equivalent to the wages and benefits it should have paid during the intervening time. This is all well-understood with respect to other civil rights statutes. *See, e.g.*, *Albermarle Paper*, 422 U.S. at 417-18 ("If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide(s) the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible' [the unlawful conduct]."") (citation omitted). The FMLA is no exception.

Contrary to petitioners' suggestion, Pet. Br. 4, 20, there are no other remedial alternatives that would fill the gap left by an absence of monetary damages. An *Ex Parte Young* action against state officials, for example, can provide only injunctive relief, and thus suffers from all of the same inadequacies as an FMLA action without a right to damages. It is not at all clear that employees whose FMLA rights are violated have a cause of action under § 1983. *See, e.g.*, *Jolliffe v. Mitchell*, 971 F. Supp. 1039, 1045 (W.D. Va. 1997) (FMLA "provides a comprehensive enforcement scheme which forecloses a section 1983 claim").[9] And administra-

[9] Of course, a state employee could bring a § 1983 action for a denial of leave that violated the Constitution as well as the FMLA. But when a FMLA violation is coextensive with a constitutional violation, there is no question but that the FMLA itself, including its damages remedy, may be applied against the States. Nobody disputes that to the extent the Act proscribes and remedies conduct unconstitutional under the Fourteenth

tive enforcement of the Act is too limited to have much effect. The Department of Labor ("DOL") enforcement resources allow it to bring only a few cases each year; in the first six years of the FMLA's life, the DOL filed a total of 32 enforcement actions. *See* U.S. Dep't of Labor, *The Family and Medical Leave Act (FMLA): 74 Months of Enforcement and Outreach Activity* (Aug. 5, 1993 – Sept. 30, 1999) (DOL fact sheet on file with NWLC). The six million state employees nationwide cannot rely on the federal government to vindicate their FMLA rights, and States have little reason to fear a DOL enforcement action against them for noncompliance with the FMLA.

As a practical matter, only a monetary remedy can make the substantive provisions of the FMLA effective. In the real world, petitioners' challenge to the FMLA's back-pay and damages provisions amounts to a challenge to Congress' authority to regulate state employment practices at all. Indeed, petitioners themselves appear to understand that what is at issue here is nothing less than "Congress's authority to regulate the employment policies of sovereign States." Pet. Br. 3; *see also* Cert. Pet. 15, 23-24 (describing States' uncertainty about whether they are required to *comply* with the FMLA). This Court, of course, has made clear that Congress does have the authority to regulate the States as employers. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). Congress should not be deprived of the practical tools it needs to make that authority meaningful – least of all with respect to a statute that seeks to remedy gender stereotyping and associated inequalities for which the States bear great responsibility.

Amendment, it is a valid exercise of § 5 authority to which the States are fully subject. In short, to the extent § 1983 provides a damages remedy under those circumstances, it is superfluous to the remedy already provided by a clearly valid application of the FMLA to state employers.

III. RESPONDING TO THE JUDICALLY RECORDED INJURY OF UNCONSTITUTIONAL GENDER DISCRIMINATION BY THE STATES, CONGRESS PROPERLY EXERCISED ITS POWER UNDER § 5 OF THE FOURTEENTH AMENDMENT.

Congress deliberately made the FMLA applicable to state employers. In so doing, it relied on its authority under § 5 of the Fourteenth Amendment, which allows it to abrogate state sovereign immunity. *See, e.g., Kimel v. Florida Board of Regents*, 528 U.S. 62, 80 (2000). While petitioners are wrong to assert that Congress was required to invoke its § 5 authority explicitly on the face of the statute, Pet. Br. 17, in fact Congress did do so in this particular instance, *see* 29 U.S.C. § 2601(b)(5). Congress clearly sought to promote equality by eradicating traditional barriers that limit opportunities for both men and women. And the FMLA clearly falls within Congress' § 5 power, as a statute targeted at stereotypes that both derive from unconstitutional gender discrimination and are a source of contemporary discrimination.

A. A Judicial Record of Unconstitutional Discrimination Is Sufficient to Support Remedial Legislation Under § 5.

This Court's own gender-discrimination case law, *see supra* Part I, does more than explain the discriminatory dynamic that the FMLA addresses. It also has independent legal significance in a case involving Congress' authority to enact remedial legislation under § 5. In this context, the Court's case law serves as a "judicial record" of unconstitutional gender discrimination by the States. The existence of that record makes parallel legislative findings of unconstitutional state practices unnecessary.

Petitioners argue that *Kimel* and *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), require that Congress compile a significant legislative record of unconstitutional state con-

duct before it may exercise its § 5 authority. Pet. Br. 31. Whether or not that is true in cases like *Kimel* and *Garrett*, *see, e.g.*, *Kimel*, 528 U.S. at 91 ("lack of support [in the legislative record] is not determinative of the § 5 inquiry"), it is not true here. No such requirement could sensibly apply when the statute in question is aimed at remedying discrimination against a class entitled to heightened scrutiny under the Court's own Fourteenth Amendment doctrine.[10]

Both *Kimel* and *Garrett* turn critically on the fact that the statutes at issue purported to remedy discrimination that is subject only to rational basis scrutiny. As the Court explained in *Kimel*, a classification based on age is "unlike governmental conduct based on race or gender." 528 U.S. at 83. Age classifications are not subject to heightened scrutiny because the Court has not been of the view that age classifications generally or often "reflect prejudice and antipathy." *Id.* Because the Court's Equal Protection jurisprudence holds that discrimination against the aged rarely rises to the level of unconstitutionality, the Court in *Kimel* put Congress to the burden of demonstrating through some alternate means that a constitutional problem did indeed exist. *Id.* at 91 (absence of legislative findings of unconstitutional age discrimination by the States "*confirms* that Congress had no reason to believe that broad prophylactic legislation was necessary in this field") (emphasis added). Congressional findings, that is, are but "[o]ne means" by which the Court may satisfy itself that discrimination against a given group is of constitutional concern when the Court's own case law is to the contrary. *Id.* at 88.

Garrett is consistent with *Kimel* in this respect. In a separate concurrence, Justices O'Connor and Kennedy – two

[10] Though legislative findings are not necessary here, Congress did in fact make ample findings supporting its exercise of § 5 authority. *See* Brief of Respondent Hibbs Part I.D.

of the five Justices in the *Garrett* majority – agreed that there was not a sufficient showing of unconstitutional discrimination against persons with disabilities. That problem could have been cured, however, not only by congressional findings, but also by "confirming *judicial* documentation." 531 U.S. at 376 (emphasis added). "If the States had been transgressing the Fourteenth Amendment . . . one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations." *Id.* at 375-76.

That, of course, is precisely what we have here. The injury Congress seeks to remedy through the FMLA is the same evil that has compelled this Court to require heightened scrutiny of gender classifications. The Court's own case law serves as just what the Court found notably absent in *Kimel* and *Garrett* : a judicial record of unconstitutional State conduct. *Compare Kimel*, 528 U.S. at 82-83 (examining case law involving claims of unconstitutional age discrimination and finding it lacking) *with South Carolina v. Katzenbach*, 383 U.S. 301, 309-11 & n.5 (1966) (relying on case law documenting unconstitutional state voting practices to uphold validity of Voting Rights Act under § 5). Congress generally is presumed to legislate against the backdrop of this Court's case law, *see Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), and it should be entitled to do so here.

In the § 5 context as in others, legislative findings may help the Court to understand facts and circumstances with which it would otherwise be unfamiliar. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 562 (1995) (formal congressional findings are not required but may be helpful to Court in evaluating legislative judgments that are not self-evidently correct). But here, the Court's own case law puts it in a perfectly good position to understand both the existence of unconstitutional state gender discrimination and the crucial link between that discrimination and the gender stereotypes at

which the FMLA is aimed. Given the Court's own judicial record, there is no reason to require that Congress make parallel, superfluous legislative findings. Nothing in *Kimel* or *Garrett* compels that result, and there is no reason to attribute such an irrational requirement to this Court.[11]

B. The FMLA Is a Permissible Exercise of § 5 Authority.

1. In some of its applications (*e.g.*, requiring that leave be made available to men as well as women), the FMLA prohibits only behavior that is unconstitutional, and thus raises no question as to validity under § 5. *See supra* n.9. At issue here are the respects in which the FMLA goes further, and regulates conduct (*e.g.*, denial of leave to men and women alike) that might be upheld as constitutional by the courts. Even those provisions of the FMLA that do not directly regulate unconstitutional behavior, however, do proscribe practices that reflect and perpetuate the stereotypes that are the root cause of unconstitutional gender discrimination. That is precisely the "'broader swath'" of conduct that Congress is permitted to make illegal pursuant to § 5. *Garrett*, 531 U.S. at 365.

Katzenbach v. Morgan, 384 U.S. 641 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980) – reaffirmed on several recent occasions, *see, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) – prove the point. In *Morgan* and *City of Rome*, the Court established that Congress' § 5 authority extends to the prohibition of state practices that, though themselves constitutional, have a disparate impact on

[11] This analysis applies fully to the FMLA's damages provisions. The Court has acknowledged repeatedly that Congress may make money damages available pursuant to its § 5 authority, especially when there is a "documentation of patterns of constitutional violations committed by the State." *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). This should be no less true when the documentation is judicial rather than legislative.

protected classes and a clear link to entrenched unconstitutional behavior by the states. *Morgan* approves a congressional ban on the use of English literacy tests as a voting qualification. Though not unconstitutional, the tests had the effect of making it difficult or impossible for non-English speaking immigrants to vote, 384 U.S. at 652, and were linked, the Court was concerned, to prejudice against immigrants, *id.* at 654. That was enough to justify congressional action under § 5. *City of Rome* clarifies that Congress may ban electoral practices that are discriminatory in effect even if the Constitution reaches only intentional discrimination, at least so long as there is some connection to unconstitutional behavior. 446 U.S. at 175-77; *see also South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (same).[12]

Similarly, the FMLA prohibits a practice – the denial of caretaking leave – that disproportionately burdens women and is inextricably linked to unconstitutional gender discrimination. *See supra* Part II.A. Even if States do not intentionally discriminate against women by denying leave to all their employees, Congress reasonably could conclude that stereotypes about the gender-based division of labor – that is, a presumption that employees have spouses at home to attend to domestic duties – "play[] a prominent role" in adoption of such no-leave policies. *Morgan*, 384 U.S. at 654; *see supra* at 12-13 (supporting legislative history). And the connection works both ways. Just as denial of voting rights in *Morgan* was a result of historical discrimination and also a cause of continuing discrimination, *see id.* at 652 (denial of franchise makes it more difficult for Puerto Ricans to gain nondiscriminatory treatment in public services), so denial of

[12] *City of Rome* and *South Carolina v. Katzenbach* involve Congress' power under the enforcement clause of the 15th Amendment, rather than the 14th. This Court has construed the two clauses as coextensive. *See City of Rome*, 446 U.S. at 176.

family leave reflects and also further entrenches stereotyped notions of proper sex roles, *see supra* Part II.A.

In *Kimel*, *Garrett*, and *City of Boerne*, the Court invalidated congressional legislation that it believed to be inconsistent with its own approach under the Equal Protection and Free Exercise Clauses. *Amici* believe that those cases are wrongly decided. What is important here, however, is that the concerns the Court expressed in those cases have no application to this one. The FMLA furthers principles established by this Court's Equal Protection jurisprudence, and supplements the judicial effort to dismantle the underpinnings and effects of unconstitutional gender discrimination. That congressional contribution, like those approved in *Morgan* and *City of Rome*, is well within the § 5 authority.

2. In more recent cases that do not involve efforts to address practices that have a disparate impact on classes specially protected under the Equal Protection Clause, this Court has applied a "congruence and proportionality" standard to purported § 5 legislation. *See, e.g.*, *Kimel*, 528 U.S. at 81. It is not at all clear that a statute like the FMLA – which does address practices with disproportionate effects on a specially protected class, and which is squarely governed by cases like *Morgan* and *City of Rome* – is properly reviewed under that standard. *See generally* Br. of *Amicus Curiae* Lawyers' Comm. for Civil Rights. But the Court need not decide that question here, for the provisions of the FMLA are "congruent and proportional" to the harm addressed.

Contrary to petitioners' argument, the fact that the FMLA specifies a twelve-week minimum for job-protected leave does not somehow take the leave provisions outside the scope of Congress' remedial authority. This Court itself is empowered to establish prophylactic rules that are not directly required by the Constitution, and also to specify the precise form that those prophylactic measures shall take. *See*

Dickerson v. United States, 530 U.S. 428 (2000) (*Miranda* warnings). Congress' remedial power, expressly granted by § 5 of the Fourteenth Amendment, is no more limited. *See Morgan*, 384 U.S. at 650 (broad scope of Congress' remedial power under § 5).

Twelve weeks represents Congress' assessment of the period of time that most fairly balances the needs of the many workers who wish to remain home to fulfill caretaking responsibilities with the needs of their employers. Striking that balance is peculiarly within the legislative expertise, and there is no reason for this Court to second-guess Congress' expert judgment here. *Cf. Morgan*, 384 U.S. at 656 ("Congress' prerogative to weigh [] competing considerations"); *id.* at 657-58 (under "familiar principle[] that a 'statute is not invalid under the Constitution because it might have gone farther than it did,'" limited measures chosen by Congress are valid under § 5) (citation omitted).

The FMLA's money damages provision is also entirely congruent and proportional to the economic injury it addresses. As discussed above, making monetary relief available is crucial to the FMLA's effectiveness. *See* Part II.C, *supra*. Exempting the States from exposure to monetary liability – and the incentive that remedy provides – will have the predictable effect of leaving state workers without any practical protection under the FMLA.

At the same time, subjecting the States to the FMLA's damages provisions does not expose them to unpredictable or open-ended damages liability. Because the Act's provisions are so specific and straightforward, States will have little difficulty assessing whether they are in compliance and need not fear unanticipated damages liability. And the monetary relief provided for by the FMLA is modest. State employees whose rights are violated may receive either back-pay awards or, if no back-pay is warranted, awards for

actual monetary losses capped at a sum equivalent to twelve weeks of wages. 29 U.S.C. § 2617(a)(1)(A)(i)(II). Liquidated damages are available only when a State has failed to act in good faith, and even then are limited to twice an employee's actual losses, 29 U.S.C. § 2617(a)(1)(A)(iii). Punitive damages and damages for emotional distress are not available at all. *See, e.g., Settle v. S.W. Rodgers, Co.*, 998 F. Supp. 657, 666 (E.D. Va. 1998), *aff'd* 182 F.3d 909 (4th Cir. 1999) (no punitive damages); *Walker v. UPS*, 240 F.3d 1268, 1277 (10th Cir. 2001) (no emotional distress damages). In short, the damages provisions are carefully crafted to protect the legal rights of state workers without unduly intruding on the dignity of the sovereign States.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

INTEREST OF AMICI CURIAE

For over a century, the American Association of University Women (AAUW), an organization of 150,000 members, has been an advocate for the advancement of women in the workforce. AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal change. AAUW was a leader in the enactment of the FMLA because we have long been committed to promoting policies that allow women to advance in the workplace. Therefore, we believe that any effort to weaken the FMLA will adversely impact women's opportunity in the workplace. AAUW plays a major role in advocating nationwide on issues to promote equity for women in the workplace, education, and civil rights.

* * *

AARP is a nonprofit membership organization serving more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Approximately 45 percent of AARP's members are employed, most of whom are protected by the FMLA. One of AARP's primary objectives is to protect its members by removing barriers to employment such as the potential threat of losing one's job as a result of caring for an ill spouse or relative. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts.

* * *

Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 44,000 faculty members and research scholars in all academic disciplines. Among the AAUP's central functions is

the development of policy standards on a number of key issues in higher education, including academic freedom, tenure, and freedom from discrimination. *See, e.g., On Discrimination,* AAUP Policy Documents & Reports (2001 ed.). As this Court has recognized, AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). AAUP and its members are deeply concerned that holding public entities, such as state universities, immune from the FMLA will impair the ability of professors and other academic professionals to protect themselves from gender discrimination in the workplace based on family responsibilities. *Statement of Principles on Family Responsibilities and Academic Work* (2001) (www.aaup.org).

* * *

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, non-partisan organization of more than 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Women's Rights Project (WRP), founded in 1971 by Ruth Bader Ginsburg, has been a leader in ensuring that employment environments support men and women as they balance work and family obligations. In its docket are cases that seek to ensure equal access to leave time under the FMLA, including *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001), in which a federal appeals court ruled that the Maryland State Police could not escape liability for their discriminatory treatment of a male state trooper who was denied leave to care for his newborn baby because of a policy that limited parental leaves of absence to "mothers only." The ACLU has appeared before this Court in numerous cases involving the proper interpretation of civil rights laws and has fought to ensure that all individuals, regardless of race, gender, or other protected characteristic,

have equal opportunities in the workplace. This case involving the scope of Congress' authority to enact the FMLA is a matter of significant concern to the ACLU.

* * *

The American Jewish Committee (AJC), a national human relations organization with over 115,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all American are equally secure. Out of its historical commitment to a federal roles in the civil rights arena, AJC participated as *amicus* in *City of Boerne v. Flores* and *Morrison v. Brzonkala* and does so again here in support of Congress' use of its Fourteenth Amendment enforcement power to remedy constitutional deprivations.

* * *

The Anti-Defamation League (ADL) was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has supported the enactment by Congress and the vigorous enforcement by the Executive Branch of our country's principal federal civil rights laws, and has consistently made its voice heard in the courts as an advocate fighting to guarantee equal treatment of all persons. In particular, ADL has filed *amicus* briefs in this Court in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, or defending government enactments designed to prevent or punish discrimination and hate. These include many of the Court's landmark cases in the area of civil rights and equal protection, as well as several cases addressing Commerce Clause issues in connection with civil rights enactments.

* * *

Business and Professional Women/USA (BPW/USA) is a nonprofit membership organization comprised of 30,000 working women in 1,600 local organizations around the country. Founded in 1919 by suffragettes, BPW/USA's mission is to achieve equity for all women in the workplace through advocacy, education and information. BPW/USA's National Legislative Platform focuses on workplace equity and work-life balance, with the membership supporting programs, policies, and laws such as the FMLA that assist workers fulfill both their work and family responsibilities.

* * *

The Center for Constitutional Rights (Center) is a national, non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution. Founded in 1966 during the Civil Rights Movement, the Center has a long-standing history of assisting those people who, as a result of discriminatory policies, practices and effects, have been denied the rights, benefits, and privileges attendant to living in the United States. As part of its advocacy and litigation on behalf of those whose rights have been violated, the Center has and continues to litigate cases under the civil rights laws of this country.

* * *

The Center for Women Policy Studies is a multiethnic and multicultural feminist research, policy analysis and advocacy organization which brings women's diverse voices to important debates – on women and AIDS, violence against women and girls, welfare reform, access to health care, educational equity, employers' work/family and workplace diversity policies, reproductive rights and health, and many other critical issues.

* * *

The Connecticut Women's Education and Legal Fund (CWEALF), founded in 1973, is a non-profit women's rights

organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF has spent much of its history defending the rights of individuals in the courts, workplaces and in their private lives. CWEALF joins this brief as *amicus curiae* because we believe the FMLA should provide essential protections for all workers as they care for family members and themselves. The broadest remedies will ensure that employers comply with the protections of the FMLA. The FMLA is an important remedy for sex discrimination and the Ninth Circuit decision should be affirmed.

* * *

The Disability Rights Education and Defense Fund, Inc., (DREDF), based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of disability rights laws, and its work related to a wide range of federal civil rights statutes.

* * *

The Epilepsy Foundation® is the sole national, nonprofit health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders. The Foundation, along with its affiliates across the country, works to improve the quality of life and promote the rights of all people with epilepsy through education, research and advocacy. Epilepsy affects people of all ages, including children. Many parents and other family members need to take time off from work to care for a family member with a seizure disorder, either because of the seizures themselves or the side effects of the medical treatment. Fortunately, because of the federal FMLA and its remedies, these families are not forced to choose between their jobs and

families, or choose their family's economic security over its physical health.

* * *

Equal Rights Advocates (ERA) is one of the oldest women's law centers in the country. Founded in 1974 as a teaching law firm, ERA's mission is to protect and secure equal rights and economic opportunities for women and girls through litigation and advocacy. ERA litigates high-impact cases on issues of gender discrimination in employment and education. ERA also provides legal advice and counseling to hundreds of individuals each year through a telephone hotline. Since its inception, ERA has focused much of its effort on ensuring that employees' rights related to pregnancy and family and medical leave are fully protected in the workplace. ERA represented plaintiffs in two of the first pregnancy discrimination cases heard by the Supreme Court, *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). More recently, ERA has advised and represented individual employees on the application and interpretation of the FMLA. ERA believes that ensuring fundamental equality for women and men in the workplace requires that employees not be forced to choose between economic security and the physical well-being of themselves or their family members.

* * *

The Feminist Majority Foundation (FMF) is a non-profit organization with offices in Virginia and Los Angeles. FMF is dedicated to eliminating sex discrimination and to the promotion of equality, women's rights, and safe access to reproductive health care. FMF worked with other organizations to pass the FMLA. FMF strongly supports the FMLA because the act increases women's ability to participate in the workplace and helps remedy the discrimination women often face in the workplace because of their family obligations. Because of the FMLA's importance to women's equality and

full participation in the workplace, FMF urges this Court to affirm the Ninth Circuit's decision and continue to protect state employees under the FMLA.

* * *

The Mexican American Legal Defense and Education Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure and protect, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases in the area of employee rights since the organization's founding. Preserving the right of Latinos to be free of discrimination in all aspects of employment is a primary goal of MALDEF's Employment program. An equally important organizational goal is to preserve the right of Latinos in all sectors, including public employment, to access all of the benefits of employment provided by law.

* * *

The National Association of Protection and Advocacy Systems (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular interest to NAPAS because many state workers care for family members with disabilities. If the protections of the FMLA are not available to these workers, their family members will be deprived of needed care.

* * *

The NARAL Foundation's mission is "To support and protect, as a fundamental right and value, a woman's free-

dom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy." In keeping with the "full range" part of our mission, the Foundation and our sister organization, NARAL, Inc., supported the FMLA, scoring it in NARAL's annual Congressional Record on Choice publication, and the NARAL Foundation/NARAL opposes narrow constructions of the Act that undermine its promise.

* * *

The National Council of Jewish Women (NCJW), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members and supporters in over 500 communities nationwide. Given NCJW's early and active involvement in passage of the FMLA and NCJW's *National Resolutions*, which support "laws, policies and employment practices that allow workers to meet both family and work responsibilities," we join this brief.

* * *

The National Council of Negro Women (NCNW) is a voluntary nonprofit membership organization that works through advocacy and community programming at the local, national, and international level to help women of African descent to improve the quality of life for themselves, their families, and communities. Founded by Mary McLeod Bethune in 1935, NCNW is an "organization of organizations" which, through its affiliated constituency-based organizations and 250 community-based sections, reaches four million women. The NCNW is the founder of the annual Black Family Reunion Celebrations across the country, and consid-

ers the FMLA an important support for workers and their families.

* * *

The National Education Association (NEA) is a nationwide employee organization with approximately 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to ending gender discrimination by educational institutions and, to this end, firmly supports the vigorous enforcement of the FMLA.

* * *

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court, singly or jointly with other *amici*. Recent cases include *Ragsdale v. Wolverine*, 122 S.Ct. 1155 (2002); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001); and *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). The interest of NELA in this case is to protect the rights of their members and members' clients, by ensuring that the FMLA's goal of providing designated leaves of absence is fully realized. This goal will be partially thwarted if the large number of state government employees in this country are excluded from the statute's protection. *Amicus* submits this brief because of the importance of the issues at bar to furthering its goals.

* * *

The National Employment Law Project (NELP) is a nonprofit legal organization that has advocated for the employment rights of low-wage and unemployed workers for over

27 years. NELP works in partnership with community-based and national advocacy organizations, with labor unions, academic institutions, policy makers and government agencies at all levels. NELP's areas of expertise include the family and medical leave laws, unemployment insurance, discrimination, immigrant worker issues, and economic justice issues generally, including the employment rights of workfare participants. NELP has a network of over 350 legal services and community-based organizations, and labor unions across the country that advocate for low-wage workers.

* * *

The National Health Law Program (NHeLP) is a national public interest law firm working to increase and improve access to quality health care on behalf of limited income people by providing legal and policy analysis, advocacy, information and education. NHeLP has also focused on the particular challenges that face families with children. Since its inception over thirty years ago, NHeLP has developed expertise on publicly funded health care and on enforcing civil rights in health care.

* * *

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in more than 500 chapters in all 50 states and the District of Columbia. Since its inception in 1986, NOW Foundation's goals have included assuring fair and equal treatment of women in the workplace. In particular, NOW Foundation has a strong interest in the full implementation of the FMLA.

* * *

9to5, National Association of Working Women, is a national, grassroots organization that strengthens women's

ability to work for economic justice. For 29 years 9to5 has reached out to women in low-wage jobs, those in traditionally female jobs and women experiencing any form of discrimination. The organization was active in winning passage of the FMLA and similar measures in a number of states. Ellen Bravo, the organization's director, served on the bipartisan Commission on Leave appointed by Congress to study the impact of the FMLA. She is also the author of *The Job/Family Challenge: A 9to5 Guide (Not for Women Only).* 9to5 has 23 chapters, activists in 250 cities, and members in every state. The group's toll-free hotline receives thousands of calls every year. Questions about family leave and pregnancy discrimination make up the second largest category of calls. Members in a number of states are active in coalitions to expand access and affordability of family leave.

* * *

The Northwest Women's Law Center, based in Seattle, Washington, is a non-profit public interest legal organization that works to advance the legal rights of women through litigation, education, legislative advocacy and the provision of legal information and referral services. Since its founding in 1978, the Law Center has been dedicated to ending sex discrimination in the workplace. The Law Center has a long history of litigation and participation as amicus curiae in cases throughout the Northwest and country on behalf of individuals seeking remedies for unlawful sex discrimination in the workplace, in educational institutions and elsewhere.

* * *

The Older Women's League (OWL) is the only national grassroots membership organization to focus solely on issues unique to women as they age. OWL is a nonpartisan, nonprofit organization that accomplishes its work through research, education, and advocacy conducted through a nationwide chapter network. Now it its 22nd year, OWL takes positions on a wide variety of public policies affecting mid-

life and older women, from retirement security to health concerns, from caregiving to Social Security. OWL has a long history of interest in the FMLA, and supports its intention as well as its faithful and full implementation.

* * *

People For the American Way Foundation (People For) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has 500,000 members and activists nationwide. People For has been actively involved in litigation and other efforts to combat discrimination, including discrimination by state government agencies. People For has supported the FMLA, and joins this brief to help vindicate the important principles at stake in this case concerning that Act. People For also joins this brief because petitioner's attempt to limit the liability of states and state agencies in federal court severely threatens the ability to protect civil rights against infringement by states and state officials.

* * *

Women Employed is a national association of working women based in Chicago with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed maintains that state employees should be permitted to sue for damages under the FMLA as it is an appropriate remedy for sex discrimination.

* * *

The Women's Law Project (WLP) is a nonprofit public interest legal advocacy organization located in Philadelphia, Pennsylvania dedicated to advancing the legal, social, and

economic status of women and their families. Since its founding in 1974, the WLP has worked to eliminate sex discrimination in our laws and institutions through litigation, public policy advocacy and individual counseling. WLP has a strong interest in the proper application of civil rights laws protecting women from employment discrimination.

* * *

Women Work! The National Network for Women's Employment is a national nonprofit organization dedicated to empowering women from diverse backgrounds and helping them achieve economic self-sufficiency through job readiness, education, training and employment. Women Work! strongly believes that workplace fairness and flexibility, such as that afforded by the FMLA, is critical to enabling women to achieve that self-sufficiency.

OCT 25 2002

No. 01-1368

In the

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,
Petitioners,

v.

WILLIAM HIBBS, *et al.*,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF RESPONDENTS WILLIAM HIBBS, *et al.*

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights under Law (the "Lawyers' Committee"), The National Asian Pacific American Legal Consortium ("NAPALC"), and The National Association for the Advancement of Colored People ("NAACP") submit this brief as *amici curiae*, with the consent of the parties,[1] in support of Respondents' argument that § 2612(a)(1)(C) of the Family and Medical Leave Act of 1993 ("FMLA") was validly enacted pursuant to Congress's power under § 5 of the Fourteenth Amendment.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Toward that end, the Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before this Court involving the scope of Congress's legislative power under the Civil War Amendments to remedy the effects of racial discrimination. *See, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

NAPALC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made a monetary contribution to the preparation of submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in addressing matters of discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The NAACP is a non-profit membership corporation that traces its roots to 1909 and was chartered by the State of New York. The NAACP supports the rights guaranteed by the Fourteenth Amendment and Congress's power under § 5 of that Amendment to pass legislation that in certain circumstances abrogates state sovereign immunity. Accordingly, the NAACP joins the other *amici* in filing this brief and urging affirmance of the decision below.

This Court's interpretation of the scope of Congress's power to enforce the Fourteenth Amendment through its § 5 powers will directly impact the communities represented by these *amici*. Therefore, *amici* present their views on this extremely important issue.

SUMMARY OF ARGUMENT

Petitioner's argument rests on the mistaken premise that the standard of review applicable to legislation enacted under § 5 of the Fourteenth Amendment to remedy the effects of an historical pattern of unconstitutional discrimination against women is the same standard of review that the Court has recently applied under the rubric of "congruence and proportionality" to remedial legislation that was enacted to protect people with characteristics that the court *has not* previously recognized as having been the subject of a pattern of discrimination by the States. With regard to these latter

groups, such as the disabled, the Court has closely examined Congress's "remedial" efforts to ensure that they are "congruent and proportional" to a constitutional violation, and to ensure that Congress is enforcing the Fourteenth Amendment, rather than expanding its substantive guarantees.

As the Court has recognized, the concerns that have motivated this more searching inquiry do not exist when Congress exercises its powers to address the effects of discrimination on the basis of a classification that receives heightened scrutiny. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000). The Court developed heightened scrutiny in response to long and well-established histories of the States' unequal treatment of persons on the basis of certain characteristics, such as race and sex, and because distinctions based on race or sex are "seldom relevant to the achievement of any legitimate state interest" and often simply reflect "prejudice and antipathy." *Id.* at 83 (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)). In light of the recognized histories of "difficult and intractable" effects of such discrimination, the Court has indicated that Congress may enact "powerful remedies" to eliminate State-sponsored discrimination and to prevent its recurrence in the future. *Id.* at 89.

When Congress invokes its authority under § 5, there can be no question that it does so pursuant to the substantive guarantees of the Fourteenth Amendment where it is acting against the backdrop of such widely recognized patterns of constitutional violations. Given the clarity of the constitutional basis for Congress's authority, the Court should defer to Congress's choices as to what constitutes "appropriate legislation" to remedy the effects of such unconstitutional discrimination. U.S. Const., amend. XIV, § 5. *See also Kimel*, 528 U.S. at 80-81 ("'It is for Congress in the first instance to determin[e] whether and what legislation

is needed to secure the guarantees of the Fourteenth Amendment.'" (quoting *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)). Thus, the more rigorous and less deferential standard of review that the Court has held to apply to cases involving groups without a documented, judicially recognized history of discrimination is not appropriate in the context of classifications that receive heightened scrutiny.[2] Rather, the Court should apply, as it has done with consistency, the deferential standard of review rooted in Chief Justice Marshall's seminal opinion in *McCulloch v. Maryland*, 4 Wheat 316 (1819), which requires only that § 5 legislation be a "rational means" of enforcing the Amendment's substantive guarantees. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). Accordingly, even if the Court uses the rubric of "congruence and proportionality" in reviewing legislation that seeks to remedy discrimination subject to heightened scrutiny, such legislation should be deemed congruent and proportional if it meets the "rational means" standard.

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[2] Under the "strict scrutiny" standard applied to classifications based on race, such classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Kimel*, 528 U.S. at 84 (quoting *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 227 (1995)). Under the "intermediate scrutiny" standard, classifications based on gender will be upheld "only if they serve 'important governmental objectives and . . . the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). While the standard for racial classifications is thus more stringent, in both cases, the standards reflect the Court's recognition that discrimination on the basis of race or gender is presumptively a violation of the Fourteenth Amendment.

Here, the statute at issue, § 2612(a)(1)(C) of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.*, responds to a pattern of unconstitutional discrimination, the existence of which the Court has long and repeatedly acknowledged – specifically, the States' restriction of women's participation in the workforce and creation of stereotypes that reinforced such discrimination. The proper standard for review of this legislation, therefore, is the deferential "rational means" test of *McCulloch*, which this legislation satisfies.

In arguing that the Court's more rigorous *Kimel* standard of review has no application to the legislation involved here, *amici curiae* do not wish to be understood to embrace that standard as proper for review of any legislation enacted by Congress, which, in its judgment, is appropriate to enforce the Fourteenth Amendment. In addition to the reasons discussed in the dissenting opinions in *Kimel* and *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), *amici* respectfully submit that this standard, as applied in recent cases, is premised on an unworkable view of the legislative process, effectively requires Congress to dramatically alter the way in which it legislates, and threatens to violate separation of powers principles by imposing judicial requirements upon Congress's legislative procedure. We, therefore, urge the Court to reconsider the "congruence and proportionality" standard as applied in cases like *Garrett* and *Kimel* and return to the *McCulloch* standard, which, until recently, had been the standard the Court applied to legislation enacted by Congress under the express powers conferred upon it by the Constitution.

ARGUMENT

I. IN REVIEWING THE EXERCISE OF CONGRESS'S POWER TO REMEDY THE EFFECTS OF DISCRIMINATION AGAINST WOMEN, THE COURT SHOULD APPLY THE SAME "RATIONAL MEANS" STANDARD THAT IT HAS CONSISTENTLY APPLIED TO § 5 LEGISLATION ADDRESSED TO THE INTRACTABLE EFFECTS OF A LONG HISTORY OF UNCONSTITUTIONAL DISCRIMINATION

A. The Congruence and Proportionality Test Employed in *Kimel* and *Garrett* Does Not Apply When Congress Acts to Remedy Discrimination Against Groups Protected by Heightened Scrutiny

While, for the reasons discussed in Part II of this brief, *amici curiae* respectfully disagree with the standard of review of § 5 legislation reflected in cases such as *Kimel* and *Garrett*, the Court need not reach that issue here. For this case involves Congress's power under the Fourteenth Amendment to enact legislation respecting conduct of the States to which "heightened scrutiny" applies, and which this Court has distinguished from legislation like that involved in *Kimel* and *Garrett* proscribing conduct that was subject merely to "rational basis" review.

Unlike the legislation at issue in *Kimel* and *Garrett*, the statute involved here was enacted against the backdrop of the well-known, long history of unconstitutional discrimination against women by the States. *See* 29 U.S.C. § 2601(5) (finding that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such

responsibility affects the working lives of women more than it affects the working lives of men"); *infra* at 15-17. As this Court has long acknowledged, women, like racial minorities, have suffered a "history of purposeful unequal treatment." *Kimel*, 528 U.S. at 83. Accordingly, discrimination against such groups is presumptively unconstitutional, except in the unusual case where it could overcome heightened scrutiny. In reviewing legislation enacted under § 5 to remedy the effects of such discrimination in the race context, this Court has consistently applied the deferential standard of review derived from *McCulloch v. Maryland*, which the Court has interpreted to require only that the legislation chosen by Congress be a "rational means to effectuate" the rights that the Civil War Amendments guarantee. *South Carolina v. Katzenbach*, 383 U.S. at 324.

Recently, this Court has gone beyond the *McCulloch* standard and applied a more rigorous standard of review to congressional legislation only in cases where the groups that Congress sought to protect had not heretofore been recognized by the Court as having a history of purposeful unequal treatment. Although in *United States v. Morrison*, 529 U.S. 598 (2000), the Court, in *dicta*, used the terms "congruence" and "proportionality" in a discussion of the fit between the relevant provision of the Violence Against Women Act ("VAWA") and the injury it was intended to remedy, *Morrison*, 529 U.S. at 625-26, the *Morrison* holding with respect to § 5 was that VAWA was an unconstitutional exercise of Congress's powers because it was not directed "at any State actor, but at individuals who . . . committed criminal acts motivated by gender bias." *Id.* at 626. Thus, there is no tension between the holding in *Morrison* and the observations of the Court that groups like those involved in *Kimel* and *Garrett* are "unlike those who suffer discrimination on the basis of race or gender," and have not been subjected

to a "history of purposeful unequal treatment." *Kimel*, 528 U.S. at 83.

As the Court has emphasized, differential treatment by the States on the basis of such classifications is subject only to "rational basis" review, under which the constitutionality of the use of the classification is presumed, except in cases where no rational basis for the discrimination can be discerned. As noted, in *Kimel*, the Court explicitly distinguished the legislation before it on this ground, observing that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and apathy," and that the elderly, "again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" *Kimel*, 528 U.S. at 83 (citations omitted). Similarly, in *Garrett*, the Court found it significant that it had previously determined that disability did not "qualif[y] as a 'quasi-suspect' classification," and hence, was subject only to rational basis review. *Garrett*, 531 U.S. at 366, 367 (noting that under rational basis review, "the burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'") (citations omitted). Thus, the Court in both *Kimel* and *Garrett* found it ambiguous whether the legislation at issue could "be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 86 (citing *City of Boerne*, 521 U.S. at 532). *See also Garrett*, 531 U.S. at 366. For that reason, the Court more closely reviewed the legislative record for evidence of widespread constitutional violations requiring a remedy under § 5.

No such ambiguity exists where Congress legislates against the intractable effects of racial and gender discrimination. First, unlike the discrimination at issue in *Kimel* and *Garrett*, discrimination on the basis of race or gender is subject to heightened scrutiny by this Court for purposes of the Equal Protection Clause. Because under heightened scrutiny, the burden of proving a nondiscriminatory purpose rests upon the State, *see United States v. Virginia*, 518 U.S. 515, 533 (1996) (gender); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (race), such discrimination is presumed to violate the Equal Protection Clause. In other words, the Court has recognized that where racial and gender discrimination occurs, it usually violates the Fourteenth Amendment and thus, calls for a remedy under § 5.

Second, both racial and gender discrimination have long been acknowledged *by the Court* to have a "history of purposeful unequal treatment." *Kimel*, 528 U.S. at 83; *infra* at 15-17. In contrast, the lack of such "judicial documentation" in *Garrett* convinced at least two Justices that the Americans with Disabilities Act was beyond Congress's § 5 power. *Garrett*, 531 U.S. at 375-76 ("If the States had been transgressing the Fourteenth Amendment . . ., one would have expected to find in decisions of the States and . . . the United States extensive litigation and discussion of the constitutional violations.") (concurring opinion of Kennedy, J., joined by O'Connor, J.). By contrast, in the case of classifications on the basis of race or gender, the pattern of unconstitutional conduct that was found wanting in *Kimel* and *Garrett* has been repeatedly acknowledged by the Court itself, eliminating any ambiguity, from the outset, as to whether Congress has an appropriate basis upon which to invoke its remedial authority under § 5.

In sum, because the Court's equal protection jurisprudence has already established that racial and gender discrimination are presumptively unconstitutional and reflect an historic pattern of unconstitutional conduct, the need that the Court perceived in cases such as *Kimel* and *Garrett* to go beyond the *McCulloch* standard and closely review the legislative record does not arise.

B. This Court Reviews § 5 Legislation Enacted to Remedy the Effects of Discrimination against Groups Protected by Heightened Scrutiny under the Deferential "Rational Means" Standard Derived from *McCulloch* v. *Maryland*

Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., amend. XIV, § 5. Section 5 "is an affirmative grant of power to Congress." *Kimel*, 528 U.S. at 80. Thus, "'[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'" *Id.* at 80-81 (quoting *City of Boerne*, 521 U.S. at 536). Accordingly, when legislating under § 5, Congress is not limited to proscribing conduct that violates the Fourteenth Amendment, but rather, is empowered "to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81 (citing *City of Boerne*, 521 U.S. at 518). *Accord Garrett*, 531 U.S. at 365 (citations omitted).

As the Court has long recognized, the Framers of the Fourteenth Amendment intended to give Congress the same broad powers of the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, in determining "whether and what legislation is needed" to secure the Amendment's guarantees.

See Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (citing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)). Thus, the "measure of what constitutes 'appropriate legislation' under § 5" is the broadly deferential standard of review articulated by Chief Justice Marshall in *McCulloch v. Maryland*.[3] *Katzenbach v. Morgan*, 384 U.S. at 650-51 (quoting *McCulloch*, 4 Wheat at 421). *See also South Carolina v. Katzenbach*, 383 U.S. at 326-27 (holding that the *McCulloch* standard is "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment," as in "all cases concerning the express powers of Congress with relation to the reserved powers of the States."); Evan H. Caminker, *"Appropriate" Means-Eds Constraints on Section 5 Power*, 53 Stan. L. Rev. 1127, 1134-43 (2001).

The Court has interpreted the *McCulloch* standard to require only a rational relationship between the ends of the legislation and Congress's chosen means. The desirability of the legislation as a policy matter, or the extent to which Congress might have chosen other, more narrowly tailored means, are beyond the scope of the Court's review. Hence, "[i]f it can be seen that the means adopted are readily calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone." *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) (citation omitted). This deferential standard is mandated by

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[3] In the famous words of Chief Justice Marshall: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 4 Wheat at 421.

the concept of separation of powers so fundamental to our constitutional structure. As the Court has acknowledged, any further scrutiny of legislation that Congress has deemed necessary and proper "would be to pass the line which circumscribes the judicial department and to tread upon legislative ground." *James Everard's Breweries v. Day*, 265 U.S. 545, 559 (1924) (citing *McCulloch*, 4 Wheat. at 423).

The deference due to Congress's exercise of the legislative power expressly conferred on it by § 5 is surely entitled to at least the same deference accorded by this Court in determining whether congressional legislation (other than legislation discriminating on the basis of suspect classifications) violates the equal protection principles of the Fifth Amendment. In the latter context, the Court has held:

> we never require a legislature to articulate its reasons for enacting a statute, [and] it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . Thus, the absence of "legislative facts" explaining the distinction "on the record" . . . has no significance in rational-basis analysis. . . . In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

FCC v. Beach Communications, 508 U.S. 307, 315 (1993) (reviewing federal Cable Communications Policy Act of

1984) (citing cases). *See also Heller v. Doe by Doe*, 509 U.S. 312, 319-21 (1993).

From the very outset, the powers conferred on Congress in enacting "appropriate legislation" under the Civil War Amendments have been reviewed under the deferential *McCulloch* standard. As the Court held over a century ago:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1879). Consistent with the principles of the *McCulloch* standard discussed above, the Court has determined that legislation enacted under the Civil War Amendments need only be a "rational means to effectuate" the rights that the Amendments contain. *South Carolina v. Katzenbach*, 383 U.S. at 324. The Court has repeatedly affirmed the applicability of the *McCulloch* standard to legislation enacted under the Amendments to remedy racial discrimination. *See City of Rome v. United States*, 446 U.S. 156, 175 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-44 (1968); *Katzenbach v. Morgan*, *supra*, 384 U.S. at 650; *South Carolina v. Katzenbach*, 383 U.S. at 326-27.

Thus, the Court has unanimously held that Congress is empowered to enact antidiscrimination legislation that applies to the entire Nation without evidence that the discrimination

sought to be remedied exists in every State, because, among other reasons, "nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country." *Oregon v. Mitchell*, 400 U.S. at 284 (upholding nationwide ban on literacy tests under Voting Rights Act Amendments of 1970) (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.).

The Court's most comprehensive articulation of the standard to be applied to legislation enacted under § 5 of the Fourteenth Amendment appears in *Katzenbach v. Morgan*, *supra*. There, the Court held that § 4(e) of the Voting Rights Act of 1965, which forbade States from denying the vote to covered persons on the ground of inability to read or write English, was proper § 5 legislation, notwithstanding the Court's previous determination that literacy tests in themselves are not unconstitutional. *See Katzenbach v. Morgan*, 384 U.S. at 643-44, 646. Consistent with the *McCulloch* standard, the Court did not rely on whether Congress had amassed evidence of the need for the provision or whether § 4(e) was sufficiently tailored to minimize intrusion upon the sovereignty of the States. Rather, the Court noted that the only relevant considerations on its review were: "whether § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *Id.* at 651.

Applying these factors, the Court found that the provision "may be regarded as an enactment to enforce the Equal Protection Clause" because it "may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government." *Id.* at 652. In addition, it could be "readily seen as 'plainly

adapted' to furthering the aims of the Equal Protection Clause" because its "practical effect" was to prohibit New York from denying the right to vote for members of that group, which would "be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." *Id.* Moreover, the Court emphasized that the wisdom of Congress's legislative judgment – including the extent of the discrimination that Congress sought to remedy and the necessity of enacting § 4(e) to eradicate that discrimination – was not a question for the Court. As the Court explained:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations – the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement . . . . It is not for us to review the congressional resolution of these factors. *It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.*

Id. at 653 (emphasis added).

While the cases in which the Court has applied the *McCulloch* standard have all involved legislation addressing the effects of racial discrimination, the reasons for the Court's adherence to the *McCulloch* standard apply equally to laws addressed to the effects of discrimination by States against

women. As the Court has long recognized, like racial minorities, women have been the victims of a pattern of unconstitutional discrimination throughout the Nation's history. It is well established that "our Nation has had a long and unfortunate history of sex discrimination." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). Furthermore, "[w]hile the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'" *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1994) (citation omitted). And, as in the case of racial discrimination, the Court has applied heightened scrutiny to any classifications based on gender because like race, gender is a classification that is rarely justified by any state interest. *See Frontiero*, *supra*, 411 U.S. at 686. Accordingly, the Court has recognized the appropriateness of prophylactic measures to remedy the continuing effects of the Nation's history of discriminatory treatment of women. *See Califano v. Webster*, 430 U.S. 313, 318 (1977) (*per curiam*) (upholding provision of Social Security Act allowing women greater old-age benefits as an enactment that "works directly to remedy some part of the effect of past discrimination" against women, "who as such have been unfairly hindered from earning as much as men.").

Among the forms of that discrimination has been the restriction by the States of women's participation in the workforce based on stereotypical "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (noting that "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed that women were less able than men to perform a particular function.") (citing cases). In

particular, the States gave legal status to the view that women were unfit for any role beyond family caregiver. *See, e.g.*, *Bradwell v. Illinois*, 16 Wall. 130, 141 (1872) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."). The pervasiveness of this state-imposed stereotype is reflected in the abundance of case law documenting the States' exclusion of women from working life. *See Hibbs v. Nevada Dep't of Human Resources*, 273 F.3d 844, 861-64 (9th Cir. 2001) (examining numerous cases upholding discriminatory statutes limiting permissible hours during which women could work or barring women from particular lines of work altogether).

These laws were predicated on the same stereotypical rationale articulated by Justice Bradley in *Bradwell*, namely, to ensure that women were not distracted from "the proper discharge of the maternal functions" and "the maintenance of the home." *Hibbs*, 273 F.3d at 864 (citations omitted) (collecting cases). Notwithstanding the Court's application over the past three decades of heightened scrutiny to discriminatory state action based on gender, these stereotypes continue to exist and impede women's equal participation in the workplace. *See* Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. Rev. 707, 708 (2000) (concluding that "employers exact penalties on women . . . because of the presumption that women will leave the workforce when they have children.").[4]

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[4] In addition, we respectfully refer the Court to the brief of *amici curiae* NOW Legal Defense and Education Fund, *et al.*, for a more detailed examination of the history of the States' discrimination against women.

C. Even If the Court Requires Legislation Remedying the Effects of Discrimination Subject to Heightened Scrutiny to Be Congruent and Proportional, Such Legislation Should Be Held to Be Authorized by § 5 If It Meets the "Rational Means" Test

As discussed above, *amici* believe that *McCulloch* sets forth the proper analysis for determining whether Congress's actions to remedy the effects of discrimination subject to heightened scrutiny were appropriate legislation under § 5. Thus, even if the Court determines that the congruence and proportionality rubric applies to legislation enacted to remedy discrimination against women, *amici* submit that the *McCulloch* "rational means" test is the proper standard for the determination of whether such legislation is congruent and proportional. As we have shown, the circumstances surrounding the Court's application of a more searching standard of review than is appropriate under the *McCulloch* standard do not exist where Congress seeks to eradicate the effects of discrimination against protected classes such as women. Accordingly, § 5 legislation addressed to remedying the effects of gender discrimination is congruent and proportional if it is a rational means to accomplishing that purpose.

D. Section 2612(a)(1)(C) of the Family and Medical Leave Act May Be Viewed As a Rational Means of Remedying the Effects of Discrimination Against Women

In applying the *McCulloch* standard of review to § 2612(a)(1)(C), the Court should ask only whether the legislation addresses individuals protected by heightened scrutiny and, if so, whether Congress could have determined that it was a rational approach to addressing the problem. In this case, because there is no question as to the existence of a

pattern of unconstitutional gender discrimination, the only issue remaining for the Court is whether § 2612(a)(1)(C) is a "rational means" of combating the effects of the state-enforced gender stereotype discussed above. As noted, under this standard, "[i]t [is] for Congress . . . to assess and weigh the various conflicting considerations – the risk or pervasiveness of the discrimination . . ., the effectiveness of eliminating the [state action at issue] as a means of dealing with the evil, the adequacy of alternative remedies, and the nature and significance of the state interests that would be affected . . . ." *Katzenbach v. Morgan*, 384 U.S. at 653. Section 2612(a)(1)(C) clearly satisfies this standard.

By requiring employers to provide up to 12 weeks unpaid leave to care for family members on a gender-neutral basis, § 2612(a)(1)(C) assures that, at least in some cases, family leave will be taken by men. This serves both to break down the stereotype of women as primary caregivers and to allow spouses to allocate family caregiving responsibilities according to their own preferences, rather than the gender roles forced upon them by the States. Furthermore, as the Ninth Circuit correctly determined, § 2612(a)(1)(C) is a rational means of counteracting any tendency on the part of employers to view women as less desirable job candidates than men because of the state-sponsored perception that they will require more time off to tend to their families. *See Hibbs*, 273 F.3d at 867.

Petitioner's view of the ends that Congress addressed in the family leave provision of FMLA is unduly narrow. Pet. Br. at 30-35. The issue is not whether States have had a pattern of discriminatory leave policies or whether many States have family leave policies that are at least as generous as that provided under § 2612(a)(1)(C). As noted, the federal leave policy can reasonably be seen as a means of eradicating the effects and stereotypes engendered by a long history of

state-sponsored discrimination, which clearly falls within its § 5 powers. *See City of Rome*, *supra*, 446 U.S. at 176; *South Carolina v. Katzenbach*, *supra*, 400 U.S. at 319-20. Moreover, notwithstanding the existence of state leave policies, Congress could rationally have concluded that uniform, nationwide minimum standards are desirable to remedy the pervasive gender stereotypes created by the Nation's history of state-sponsored discrimination. *See Oregon v. Mitchell*, 400 U.S. at 284.

In sum, as this Court has recognized, the existence of a pattern of state discrimination on the basis of gender can be presumed. Hence, even if the congruence and proportionality test applies, legislation adopted by Congress to address the effects of such discrimination is "congruent and proportional" if it can be discerned that the legislation is a "rational means" to address those effects. Here, § 2612(a)(1)(C) "may be viewed" as a rational means of enforcing the Equal Protection Clause, and is therefore valid legislation under § 5. *Katzenbach v. Morgan*, 384 U.S. at 652.

II. THE COURT SHOULD RECONSIDER THE MORE RIGOROUS STANDARD OF REVIEW THAT IT HAS RECENTLY APPLIED TO § 5 LEGISLATION TO DETERMINE CONGRUENCE AND PROPORTIONALITY

We have shown above that the standard of review employed to determine congruence and proportionality in cases like *Kimel* and *Garrett* does not apply to legislation, like the legislation before the Court, aimed at remedying the effects of gender discrimination. We also respectfully urge the Court, however, to reexamine the standard of review it has recently applied in cases such as *Kimel* and *Garrett* and return to a more deferential standard in evaluating the validity of all legislation Congress seeks to enact under its § 5 powers.

In *City of Boerne* and subsequent cases, the Court has continued to recognize that it should defer to Congress's judgments and that "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517). Nevertheless, in applying the "congruence and proportionality" standard, the Court has closely scrutinized the legislative record for evidence of a "pattern" of unconstitutional state discrimination, insisted that attempts to deal with such discrimination on a uniform, national basis be supported by evidence in the record, and questioned the quality of the evidence that is reflected in the record and the inferences that Congress was entitled to draw from it.

Respectfully, we submit that this approach is inconsistent with the principle of separation of powers and unduly intrudes on Congress's legislative function. As noted, this Court has emphasized that

> [a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle is it possible to preserve to the legislative branch its rightful independence and its ability to function.

FCC v. Beach Communications, *supra*, 508 U.S. at 315 (citations omitted). Yet, in determining "congruence and proportionality" in cases such as *Kimel* and *Garrett*, the Court has required that Congress indicate the "reasons for [its] action" in the legislative record and support those "reasons" with evidence of the necessity of § 5 legislation. *Kimel*, 528 U.S. at 88. The Court thus appears to have imposed an

evidentiary standard more appropriate to an administrative agency than a coordinate branch of the Federal Government. *See Garrett*, 531 U.S. at 376 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.).

Moreover, the Court appears to have limited the inferences that Congress may draw through the use of common sense from the information it has received from multiple sources. For example, in *Garrett*, this Court held that substantial evidence of society-wide stereotypes concerning the disabled, and even discrimination by government officials of municipalities, were not a sufficient basis for Congress to infer that state officials were as likely to hold the same stereotypes and prejudices that affected or were likely to affect their treatment of the disabled. *See Garrett*, 531 U.S. at 377-78 (opinion of Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). And the requirement of a record showing a pattern of discriminatory state action also implies that Congress's power "to enforce" the Fourteenth Amendment limits it to legislation remedying past conduct that can be reflected in a record and precludes it from legislating prophylactically to protect against incipient or potential conduct that threatens to undermine the guarantees of the Fourteenth Amendment. *See* John T. Noonan, Jr., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 93 (2002).

With all respect, we believe that the Court's standard of review in these cases not only violates the separation of powers by imposing judicial requirements upon Congress's legislative procedure, but also reflects an unworkable view of the legislative process and, in effect, calls upon Congress to dramatically alter the way in which it legislates.

First, the Court's apparent requirement that Congress articulate a single, coherent policy rationale and support that

rationale with evidence in the legislative record does not accord with the reality of the legislative process. Members of Congress represent constituencies with diverse, often conflicting, interests. Hence, legislation is rarely, if ever, reached through consensus, but rather, through competition and majority vote. *See* Philip P. Frickey & Steven S. Smith, Essay, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1741-45 (2002). Moreover, legislation is generally the product of a competitive process of bargaining and coalition-building as opposed to rational deliberation. Accordingly, in many, if not most, cases, no specific, identifiable rationale exists. *See id.* at 1744-45.

In addition, the Court's requirement of an evidentiary predicate in the legislative record mistakenly assumes that all the information upon which Congress draws in enacting legislation is incorporated in that record. Congress is informed through numerous sources that are not reflected in the legislative record. For example, Members of Congress bring to the legislature the views and experiences of the citizens whom they represent. Thus, unlike a trier of fact in a court or an administrative law judge, Congress is not a "*tabula rosa* until it conducts on-the-record proceedings," but rather, "grounds its claim to legitimacy on knowledge of and accountability to the citizens it represents." A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328, 385-86 (2001). In addition, Congress acquires information from, inter alia, communications with interest groups, information support services such as the General Accounting Office and the Congressional Research Service of the Library of Congress, written materials from party leadership offices, members' caucuses, legislators' personal staffs, and

communications with the executive branch. *See id.* at 384-87; Frickey & Smith, *supra*, at 1734-36.

Thus, among the branches of the Federal Government, Congress is uniquely capable of amassing information from a wide range of sources, both during and outside of its formal proceedings. Reliance on the legislative record alone is therefore an incomplete measurement of the basis for Congress's judgments. More significantly, however, it appears that if Congress is to satisfy the congruence and proportionality test as applied in cases like *Kimel* and *Garrett*, it must painstakingly catalogue the information acquired from such extra-record sources in the legislative record. For the reasons discussed above, this would mark a dramatic alteration of Congress's legislative procedure.

Furthermore, by requiring Congress to adhere to judicially imposed procedural requirements when it legislates, the Court's application of the congruence and proportionality test conflicts with at least the spirit of a number of constitutional provisions that limit judicial intrusion into the legislative sphere. These include the Rules and Journal Clauses of Article I, which provide respectively that "[e]ach House may determine the Rules of its Proceedings" and "shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require secrecy." U.S. Const. art. I, § 5, cl. 2, 3. The Court has interpreted both of these provisions as giving Congress wide discretion to determine how to report and record its consideration of legislation. *See, e.g.*, *United States v. Ballin*, 144 U.S. 1 (1892); *Field v. Clark*, 143 U.S. 649 (1892).

The more demanding standard of review applied in cases such as *Kimel* and *Garrett* also appears to conflict with the Speech or Debate Clause, which provides that "for any

Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Court has determined that one of the Speech or Debate Clause's chief purposes is "to insure that the legislative function the Constitution allocates to Congress may be performed independently" and "reinforc[e] the separation of powers so deliberately established by the Founders." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). *See also Gravel v. United States*, 408 U.S. 606, 628-29 (1972) (holding that Speech or Debate Clause prohibited court from inquiring into conduct of, or preparation for, congressional proceeding); Bryant & Simeone, *supra*, at 376-83.

We understand the Court's approach, first articulated in *City of Boerne* and applied in cases like *Kimel* and *Garrett*, to reflect two concerns: first, that in the absence of a judicially recognized history of state discrimination, Congress actually may be seeking to expand the substantive scope of the Fourteenth Amendment or is adopting a remedy that is disproportionate to the number of instances of unconstitutional state conduct; and second, that in such circumstances, there is a need to protect the sovereignty of the States against unwarranted intrusions by Congress in the guise of enforcing the Fourteenth Amendment. We respectfully submit that neither concern justifies the intrusion into the legislative process that application of the standard of review in cases like *Kimel* and *Garrett* has entailed.

In the absence of conduct involving a judicially recognized history of unconstitutional state action, this Court has limited itself to rational basis review in evaluating whether state conduct entails arbitrary and purposeful discrimination, in recognition of the Court's own fact-finding limitations and the deference due to democratically elected legislatures. But it is precisely because Congress, as a

democratically elected legislature, is not so limited that it is inappropriate to impose a rigorous standard of judicial review on Congress's determination of the existence or a threat of unconstitutional state conduct, even if not previously recognized by the Court. *See Garrett*, 531 U.S. at 382-85 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsberg, JJ.); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 467-73 (2000). As discussed above, in making legislative judgments, Congress relies on many sources of information and intuition that would not support a judicial or administrative determination, but which are characteristic of a democratic legislative process. The Fourteenth Amendment expressly assigns to Congress the task of enforcing its guarantees and, under the long tradition established by *McCulloch*, its judgments that there exists arbitrary and purposeful state discrimination requiring legislation, and what legislation is "appropriate" to enforce the Fourteenth Amendment's guarantees against such discrimination and its effects, deserve deference and respect.

We also submit that concerns that Congress may be unjustifiably intruding on state sovereignty do not support a more rigorous standard of review of Congress's legislative judgments under § 5. To begin with, as the Court has recognized, the Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (noting that the Amendments effected "the expansion of Congress's powers with the corresponding diminution of state sovereignty") (discussing *Ex parte Virginia*, 100 U.S. at 345-46). Moreover, the States are not an isolated minority requiring heightened judicial protection against a tyrannical majority. To the contrary, the political process and the structure of the Federal Government – in

particular, the States' equal representation in the Senate – were the principal means intended by the Framers to prevent inappropriate intrusions by the federal legislature on the States' sovereignty. *See Kimel*, 528 U.S. at 93-94 (dissenting opinion of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.); *Garcia v. San Antonio Metro. Transp. Auth.*, 469 U.S. 528, 550-51 (1985).

In sum, the standard recently applied by the Court to determine congruence and proportionality substitutes the Court's views of how Congress should conduct its lawmaking processes in carrying out its duty to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," and ultimately substitutes the Court's judgment for that traditionally left to Congress alone as to the "closeness of the relationship between the means to be adopted, and the end to be attained." *Burroughs v. United States*, *supra*, 290 U.S. at 547-48. This is a departure from the Court's historic recognition of its own institutional limitations and the deference due to the democratically elected legislative branch, except in cases where the Court's intervention is needed to protect the rights of individuals guaranteed by the Constitution and those "discrete and insular minorities" who do not have access to the democratic process to protect their rights against a dominant majority. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). Accordingly, for the reasons discussed above, *amici curiae* respectfully urge the Court to reconsider the rigorous standard of review it has recently applied to determine congruence and proportionality, even in cases where the Court has not previously recognized a history of purposeful unequal treatment.

CONCLUSION

For the foregoing reasons, *amici curiae* The Lawyers' Committee for Civil Rights under Law, The National Asian Pacific American Legal Consortium, and The National Association for the Advancement of Colored People respectfully urge that the Court affirm the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

v.

WILLIAM HIBBS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, MINNESOTA, NEW MEXICO, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* STATES

The *amici curiae* States urge affirmance of the Ninth Circuit Court of Appeals decision holding that Congress validly abrogated the States' Eleventh Amendment immunity when it enacted the family medical care provision of the Family Medical Leave Act (FMLA), 29 U.S.C. § 2612(a)(1)(C). We file this brief to provide the Court with our view of the proper balance between two matters of extreme importance to the States: eradication of gender discrimination in the workforce and protection of the States' Eleventh Amendment immunity from suit.

Although the States more typically advocate the application of Eleventh Amendment immunity, allowing our citizens to enforce their FMLA rights without restriction is consistent with the obligation of attorneys general of the *amici curiae* States to protect the public interest by ensuring that workplace gender discrimination against our citizens, with all of its vestiges, is eliminated. This interest is particularly acute in light of the well-documented history of state-sponsored discrimination against women in the workforce -- discrimination that was premised on the stereotypic assumption that women's primary responsibility lay at home, not at work, and that women therefore should meet family care needs at the expense of their participation in the workforce.

SUMMARY OF ARGUMENT

When Congress enacted the FMLA in 1993 to provide workers with the opportunity to meet family care needs without the loss of their jobs, it recognized that the absence of adequate gender-neutral family leave policies in the public and private sectors had a disparate impact on women. Congress also had before it a legislative and judicial record

indicating that the lack of adequate family leave policies was a vestige of a long history of unconstitutional gender discrimination, a history to which the States had directly contributed. Not only did many of the States maintain discriminatory leave policies for their own employees when the FMLA was enacted, but over the past century the States had enforced gender discrimination across the private and public sectors through a multitude of state workplace laws that disadvantaged women and reinforced the stereotypical notion that women should undertake family care responsibilities so that men would be free to fulfill their responsibilities as breadwinners. Discriminatory leave policies continued in both the private sector and in state governments despite Congress's repeated efforts to eradicate gender discrimination in employment by enacting Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the Pregnancy Discrimination Act.

With the FMLA, Congress provided a congruent and proportional means of remedying these effects of past constitutional violations and preventing future ones. Congress enacted a remedial scheme that requires employers to provide both male and female employees a minimum amount of unpaid leave to care for seriously ill family members. The FMLA's even-handed, objective application to both men and women avoids the risk that gender-specific leave availability will lead to further discrimination, while counteracting the stereotype that women should be the family caretakers. Moreover, by limiting the law's applicability, including specific exemptions to accommodate the needs of state employers, the FMLA appropriately balances the needs of employers with meaningful protection against gender discrimination. Accordingly, Congress's enactment of the FMLA's comprehensive remedial scheme, including its abrogation of the States' Eleventh Amendment immunity, was

a proper exercise of its power to enforce the Equal Protection Clause of the Fourteenth Amendment and protect both men and women from gender discrimination.

ARGUMENT

IN ENACTING THE FAMILY MEDICAL CARE PROVISION OF THE FMLA, CONGRESS PROPERLY ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The heart of the FMLA is found in § 2612(a)(1), which entitles eligible employees to take leave totaling twelve weeks per calendar year for one or more of the following reasons:

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter;
>
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care;
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition;
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

This case involves a challenge to § 2612(a)(1)(C), the "family medical care provision" of the FMLA. Petitioners argue that this provision cannot be enforced against the States in private suits for money damages because in passing this provision of the FMLA, Congress did not validly abrogate the States' Eleventh Amendment immunity.

Petitioners misleadingly state (Pet. Br. 31, 45) that seven courts of appeals have held that the FMLA does not abrogate the States' Eleventh Amendment immunity. In fact, only one court of appeals, in *Kazmier* v. *Widmann*, 225 F.3d 519 (5th Cir. 2000), has so held with respect to the provision at issue in this case. The other courts held, and the rulings in those cases are clear, that a provision of the FMLA not at issue here, the personal medical leave provision, 29 U.S.C. § 2612(a)(1)(D), which entitles an employee to unpaid leave for his or her own serious health condition, does not abrogate the States' Eleventh Amendment immunity. *See, e.g., Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000). These cases do not conflict with the Ninth Circuit's decision here because the family medical care provision and the personal medical leave provision operate in different circumstances and reflect different concerns. *See Board of Trustees v. Garrett*, 531 U.S. 356, 360 n.1 (2001).

Congress may abrogate the State's immunity only when it expresses "unequivocally" its intent to do so and when it "acts pursuant to a valid grant of constitutional authority." *Garrett*, 531 U.S. at 363. Although Congress may not abrogate a State's Eleventh Amendment immunity through the exercise of its Article I power, *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996), Congress may subject nonconsenting States to suit in federal court when done pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. *Garrett*, 531 U.S. at 364.

It is undisputed that Congress unequivocally stated its intent to abrogate the States' immunity. Rather, the question before the Court is whether 29 U.S.C. § 2612(a)(1)(C) is a valid exercise of Congress's Section 5 power, and thus, a valid abrogation of the States' Eleventh Amendment immunity. Applying this Court's precedent in *Garrett*, *Kimel*,

and other cases, the family medical care provision of the FMLA should be sustained as appropriate Section 5 legislation.

A. Congress Expressly Invoked Its Section 5 Powers in Enacting the FMLA

As a threshold matter, Petitioners contend (Pet. Br. 21-27) that Congress was not legislating under Section 5 of the Fourteenth Amendment when it enacted the FMLA because its text does not mention "Section 5 of the Fourteenth Amendment" or "directly prohibit discrimination." Contrary to Petitioners' argument, Congress expressly invoked Section 5 as one of its bases for enacting the FMLA.

The FMLA has five purposes, set forth in the text of the Act. The first two are to balance the demands of the workplace and family and to entitle employees to reasonable family and medical leave. 29 U.S.C. § 2601(b)(1), (2). The third and fourth are to accomplish the first two in a manner that accommodates the legitimate interests of employers and minimizes the potential for gender discrimination without running afoul of the "Equal Protection Clause of the Fourteenth Amendment." 29 U.S.C. §§ 2601(b)(3), (4). The fifth purpose is "to promote the goal of equal employment opportunity for women and men, pursuant to such clause." *Id.* § 2601(b)(5).

Given that the FMLA sets forth as two of its goals minimizing discrimination on the basis of sex and promoting equal employment opportunity for women and men, citing the Equal Protection Clause of the Fourteenth Amendment in both cases, there can be no doubt that Congress properly invoked its enforcement powers under Section 5. In contesting this conclusion, Petitioners acknowledge only § 2601(b)(4), arguing that the reference to the Equal

Protection Clause in that provision merely reflects Congress's attempt to ensure that the FMLA does not itself violate the Fourteenth Amendment (Pet. Br. 31, 39-41). Even if this strained interpretation of § 2601(b)(4) were correct, it ignores § 2601(b)(5) altogether, a plain reading of which allows for no other conclusion but that enforcement of the Equal Protection Clause was a basis for enacting the FMLA.

The FMLA's statement of findings confirms that the family medical care provision, in particular, is aimed at remedying gender discrimination and promoting gender equity. In § 2601(a)(5), Congress found that "due to the nature of the roles of men and women in our society, the primary responsibility for family care-taking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." Congress's finding in § 2601(a)(6), that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender," explains Congress's selection of a gender-neutral leave requirement to address the disparate impact identified in § 2601(a)(5).

B. The Family Medical Care Provision of the FMLA Is Appropriate Section 5 Legislation

Congress's enforcement power under Section 5 of the Fourteenth Amendment includes the "authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Garrett*, 531 U.S. at 365. "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997) (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)).

Whether a particular congressional response enforces the States' obligations under the Fourteenth Amendment is determined by comparing the scope of the enactment to the constitutional right being protected. If the scope of the remedy is broad, it must be justified by a proportionately pressing need. "Accordingly, section 5 legislation reaching beyond the scope of section 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365.

1. The same history that makes state-sponsored gender classifications suspect is necessarily relevant in evaluating the nature and scope of the problem of gender discrimination that Congress attempted to address and whether the FMLA is a congruent and proportional response to that problem

As evidenced in the purpose and findings sections of the Act, the FMLA enforces the Fourteenth Amendment guarantee against state-sponsored, purposeful gender discrimination, which warrants an intermediate level of judicial scrutiny. Under intermediate scrutiny, state action that classifies individuals on the basis of gender are unconstitutional unless the entity defending such action demonstrates that it is "substantially related to the achievement of [important governmental] objectives." *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 60-61 (2001); *accord United States* v. *Virginia*, 518 U.S. 515, 533 (1996); *Wengler* v. *Druggist Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). The principal reason for such elevated scrutiny is this Nation's "long and unfortunate history of sex discrimination." *United States* v. *Virginia*, 518 U.S. at 531 (quoting *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality)).

Heightened scrutiny reflects a judicial determination as to the scope and intractability of the discrimination at issue; as such, it can properly inform Congress's decision to enact remedial legislation. The same history that makes state-sponsored gender classifications suspect is necessarily relevant in evaluating the nature of the problem Congress is attempting to address in enacting remedial or prophylactic legislation to "promote the goal of equal employment opportunity for men and women." 29 U.S.C. § 2601(b)(5). It should therefore be considered by the courts in evaluating the history and pattern of discrimination and whether the legislation is congruent and proportional to fully remedy and deter that discrimination. Especially where Congress has previously acted in response to a long history of unconstitutional discrimination, as it has here, it is necessary to look to prior legislation, in addition to case law documenting discrimination, to determine whether there was a sufficient history and pattern of unconstitutional discrimination to justify the need for prophylactic Section 5 legislation.

The Court has routinely taken this approach in determining whether legislation enacted to remedy or deter race discrimination constitutes a valid exercise of Congress's enforcement powers. In *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), where the Court sustained the Voting Rights Act of 1965 as a valid exercise of Congress's enforcement powers under the Fifteenth Amendment, the Court wrote, "[t]he constitutional propriety of the [Act] must be judged with reference to the historical experience which it reflects." There, in an extended discussion, the Court outlined the long history of judicial decisions and congressional actions addressing racial discrimination in voting, from the ratification of the Fifteenth Amendment, to the States' repeated attempts to circumvent the Amendment, to congressional voting rights legislation in 1957, 1960 and

1964, all of which failed to eradicate the problem. 383 U.S. at 308-314. The Court explained that such historical data "demonstrates the variety and persistence of [state laws] designed to deprive Negroes of the right to vote," thereby informing the inquiry whether the legislation at issue was congruent and proportional to the problem. *Id.* at 311; *see also Oregon* v. *Mitchell*, 400 U.S. 112, 132-134 (1970) (Black, J.); *id.* at 234-235 (Brennan, White & Marshall, JJ.); *id.* at 284 (Stewart, J. joined by Blackmun, J., & Burger, C.J.) (relying on prior judicial decisions, prior legislation, and common knowledge in sustaining a nation-wide ban on literacy tests despite geographically limited evidence of abuse).

More recently, this Court recognized the common sense of this approach in *Kimel*, where it noted that "lack of support [in the legislative record] is not determinative of the § 5 inquiry." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000); *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 646 (1999) (same). The concurring opinion in *Garrett* similarly looked for confirming judicial documentation of unconstitutional discrimination:

> If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist.

531 U.S. at 375-376 (Kennedy and O'Connor, JJ., concurring).

The rationale for imputing historical knowledge to Congress was cogently explained in a recent decision of the

Seventh Circuit, where the court upheld as a valid abrogation the 1972 extension of Title VII provisions to the States, despite a sparse legislative record of state violations. In *Nanda* v. *Bd. of Trustees*, 303 F.3d 817 (7th Cir. 2002), the court held that Congress's familiarity with the problems of gender and race discrimination through prior legislation "'reduces the need for fresh hearings and prolonged debates,' * * * 'particularly given the well-documented history of gender [and race] discrimination in this Nation, a history that is embodied in the Supreme Court's own jurisprudence.'"

The Ninth Circuit took a different approach to ascertaining the validity of Section 5 legislation where the scope of the right at issue includes heightened judicial review of potential violations. The Ninth Circuit reasoned that because, under intermediate scrutiny, state-sponsored gender discrimination is presumptively unconstitutional, Section 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional. *Hibbs*, 273 F.3d at 857. We disagree with this framework because the use of such an analytical "shortcut" fails to ensure that the States' sovereignty interests are given due weight. While, as discussed above, a judicial determination that heightened review is required helps define the scope of the right at issue, and the historical context of that determination provides evidence of a history and pattern of unconstitutional discrimination, the inquiry nonetheless properly remains a comparison of the two to determine whether the particular remedy is congruent and proportional to the constitutional right being enforced and to ensure that Congress has not effectively redefined the constitutional obligations of the States.

2. The legislative and judicial record demonstrates that Congress viewed the provision of family medical care leave as a crucial step in its ongoing efforts to eradicate gender discrimination and its vestiges from the workforce

In light of the pivotal role historical context plays in the Section 5 inquiry, Petitioners' gravest error is to view the FMLA in isolation from Congress' ongoing efforts to eradicate gender discrimination in the workplace. In addition to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, which Congress extended to the States in 1972, 42 U.S.C. § 2000e(a), Congress passed the Equal Pay Act in 1963, 29 U.S.C. § 206(d), extended it to the States in 1974, 29 U.S.C. §§ 203(d), (e)(2), (x), and 216(b), and passed the Pregnancy Discrimination Act (PDA) in 1978, 42 U.S.C. § 2000e(k).

The FMLA is the latest in this series of legislative steps to remedy and deter gender discrimination. In identifying and choosing to remedy the problem of discriminatory leave policies, Congress was informed by both the history of its own legislation in this area and the myriad of judicial decisions evidencing the States' enforcement and reinforcement of gender stereotypes in employment for more than a century.

a. Congress was well aware of the States' involvement in this Nation's long history of gender discrimination in employment

As an active participant in eliminating gender discrimination in employment for three decades, Congress was clearly aware of the long history of state laws that gave force and effect to the stereotype that women's primary duties were at home at the expense of their equal participation in

the workforce. From state laws that precluded women from performing certain jobs, *e.g.*, *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873) (practice of law); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948) (bartending); *Oregon* v. *Hunter*, 300 P.2d 455 (Ore. 1956) (en banc) (wrestling); to state laws that limited the maximum number of hours that women could work, *e.g.*, *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908) (listing and approving laws from nineteen States); *People v. Elerding*, 98 N.E. 982 (Ill. 1912) (listing laws from 27 states); *Corning Glass Works v. Brennan*, 417 U.S. 188, 193 n.7 (1974) (noting that Pennsylvania and New York had maximum hours laws on the books as late as 1969); to state laws that prohibited women from working during nighttime hours, *e.g. New York v. Charles Schweinler Press*, 108 N.E. 639 (N.Y. 1915) (affirming statute prohibiting women from working in factories at night and noting that by 1913, nine other States had passed such laws), all were based on stereotypic beliefs regarding women's roles at home and work.

Frontiero v. *Richardson* began the cascade of decisions striking down state and federal employment-related laws premised on this stereotype, which it described as follows:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many occupations of civil life. The constitution of the family organization, which is founded on divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a

> distinct and independent career from that of her husband.

411 U.S. at 684-685 (quoting *Bradwell*, 83 U.S. at 141); *see*, *e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977) (striking down federal survivor benefits law because its underlying assumption reflected "'old notions and archaic and overbroad generalizations'" about the roles and relative abilities of men and women); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (striking down federal unemployment benefits law because its differential treatment of men and women constituted "baggage of sexual stereotypes * * * that presumes the father has the primary responsibility to provide a home and its essentials * * *, while the mother is the center of home and family life"); *Wengler*, 446 U.S. at 148 (striking down state survivor benefits law because it suffered from "offensive assumption" that women's primary role was as caregiver, not breadwinner).

The Court recognized that as a result of this stereotype, women faced "pervasive, although at times more subtle" discrimination in the job market. *Frontiero*, 411 U.S. at 684-685. Indeed, as recently as 1996, the Court was called upon to reiterate the rule that the justification for different treatment of men and women "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States* v. *Virginia*, 518 U.S. at 533.

b. The legislative record supports Congress's view that the lack of adequate family medical care leave derives from discriminatory notions of gender roles and continues to prevent women from participating equally in the workforce

As the legislative record of the FMLA indicates, the lack of family medical care leave reflects this same "overbroad generalization" about the relative roles of men and women. It also has a disparate impact on women. Congress enacted the family medical care provision of the FMLA to address this failure, a vestige of unconstitutional employment discrimination that only became evident after significant discriminatory barriers to equal employment opportunity were lifted and a critical mass of women entered the workforce.

The legislative history of the FMLA references the work left undone by the earlier anti-discrimination laws, specifically, the need for family care leave. For example, Congress heard testimony in 1987 expressing general dissatisfaction with the existing anti-discrimination laws because they had not addressed the problem of employment policies that continued to embody the discriminatory presumption that "women's role is to stay home and care for the family and men's role is to work outside the home for a paycheck":

> Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women's place is in the home. This prevailing ideology about women's roles has in turn justified discrimination against women when they do work. * * * Women are protected from outright

> workplace discrimination because of their sex or because of their roles as mothers or because of their pregnancies and related medical conditions by Title VII [] and the [PDA]. But our social structures, and most particularly our employment policies, continue to operate as if women's role is to stay home and care for the family and men's role is to work outside the home for a paycheck.[1]

While the intervening decades between passage of Title VII and the FMLA saw a profound increase in the number of women entering the workforce, S. Rep. No. 103-3, at 5-6 (1993), leave policies in both the public and private sector were still premised on the discriminatory presumption, reinforced by more than a century of unconstitutional employment laws and practices, that women would be at home to take care of the family. As Congress explained, the legislation

> speaks tellingly to that crucial intersection between job and home where family needs clash with the demands of a work world which relies as never before on female labor but whose personnel policies are more suited to a male work force with wives performing the traditional and necessary functions in the home.

H.R. Rep. No. 99-699, pt. 1, at 10 (1986). In Congress's view, "our workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family

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1. *Family and Med. Leave Act of 1987: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 100th Cong. 235 (1987) [hereinafter *1987 House Hearing*] (statement of Donna Lenhoff, Women's Legal Def. Fund).

responsibilities." H.R. Rep. No. 103-8, pt. 1, at 17 (1993); *see also id.* at 21 ("Private sector practices and governmental policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family.").

The Senate Report identifies the lack of family care leave, in particular, as a "glass ceiling" blocking women's ability to participate equally in the workforce:

> I think people misunderstand the glass ceiling problems. They don't start when a women or a person of color suddenly reaches the managerial position in corporation America. They begin really with the myriad of ways that women often find themselves sidetracked or discriminated against in employment in that corporation all along the line. And requiring family leave does quite the opposite than the assertions we often hear by the opposition, because what it guarantees for women workers and men workers is that they won't be forced off the job; they won't lose important benefits because they've got family responsibilities. And those safeguards essentially keep women on a track to promotions and to crashing through that glass ceiling.
>
> But for legislation like this, women's opportunities are truly artificially limited and barred.

S. Rep. No. 103-18, at 49 (1993).

Congress's foremost concern with respect to family medical care leave was the disproportionate impact its absence had on female employees. Cited again and again in

the legislative record are statistics showing that women disproportionately bear the responsibility for family care. *See, e.g.*, S. Rep. No. 103-18, at 4 ("Two-thirds of these caregivers [for aging parents] are working women."); H.R. Rep. No. 103-8, pt. 2, at 17 (1993) (citing HHS estimate that "2.2 million people, predominantly women, cared for 1.2 million frail elderly people in 1982. Approximately one million of them were employed for some time during the care-giving experience."); *id.* at 37 ("Though women have entered into the workforce in greater numbers, they continue to be the primary caregivers of children, elderly parents and relatives. It is expected that women will spend about 17 years caring for children and 18 years caring for an elderly relative."); H.R. Rep. No. 102-135, pt. 1, at 20 (1991) ("The National Council on Aging estimates that 20 to 25% of the more than 100 million American workers have some caregiving responsibility for an older relative. Two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women.").

The impact of the lack of adequate family care leave on women is also well-documented in the record. Congress found that women's careers were disparately affected by family care responsibilities. 29 U.S.C. § 2601(a)(5). It also heard evidence that

> [t]he adverse impact on professional women of having to juggle career and family is devastating. Too often women are forced to either forego having families or to compromise their career advancement during their child bearing years. * * * Studies also show that women who take time off to have and care for children inevitably fail to 'catch up' financially with their male counterparts. A 1983 study of 71 women in Harvard Law School Class of 1974 * * * found that the demands

> of family life were the most common reason women left high powered legal professions and that most could not stay on career fast tracks and meet family responsibilities.

1987 House Hearing, *supra*, *at* 445-446 (statement of Women's Bar Assoc. of D.C.); *see also* H.R. Rep. No. 102-135, pt. 1, at 31 (1990 study by the Southport Institute for Analysis "estimated that 11 to 13% of women caring for elderly parents actually quit their jobs to provide care.").

c. Congress also had before it evidence of expressly discriminatory leave policies by public and private employers

Congress also had before it evidence of public and private leave policies that expressly discriminated on the basis of gender. Professor Susan Ross of Georgetown University Law Center testified to "a number of studies * * * in which it's shown that employers in this country that are giving family leaves to their workers are not giving it non-discriminatorily[;] they are, by and large, giving it only to women, not to men. It's fairly flagrant discrimination."[2] In particular, the legislative record includes statistical evidence that private employers were more likely to grant parental leave to women than to men. H.R. Rep. No. 103-8, pt. 1, at 55-56 (Bureau of Labor Statistics (BLS) studies from 1990 and 1991); *see also* S. Rep. No. 103-3, at 14-15 (1993) (similar results from 1989 BLS study). The statistics for public employers mirrored those for private employers. A study by the Yale Bush Infant Care Leave Project revealed that "[t]he proportion and construction of leave policies

2. *Parental and Med. Leave Act of 1987: Hearing on S. 249 Before the Subcomm. on Children, Families, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources, Part 2*, 100th Cong. 536 (1987) [hereinafter *1987 Senate Hearing*].

available to public sector employees differs little from those offered private sector employees."[3] Meryl Frank, Director of the Yale Bush Project, testified:

> We did a survey of the public sector, a survey of Federal employees, all 50 States, and of the military. We have studied small business, mid-size businesses and large businesses to find out what they are offering. * * * We found that public sector leaves don't vary much from private sector leaves.

Id. at 29-30.

These statistics are supported by other evidence of express discrimination in state parental leave policies. *See, e.g.*, *1987 Senate Hearing*, *supra*, at 364-374 (testimony of Elaine Gordon, Fla. H.R., that leave to care for newborn children is only granted to women and that Florida rejected extending such leave to men); *id.* at 385 (testimony of Gerald McEntee, Int'l President, American Fed'n of State, County and Mun. Employees) ("the vast majority of [public employment] contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave."); *Family and Med. Leave Act of 1989: Hearing on H.R. 770 Before the Subcomm. on Labor-Mgmt. Relations of the House Comm. on Educ. and Labor*, 101st Cong. 271 (1989) (statement of the Concerned Alliance of Responsible Employers) (thirteen States grant parental leave to women but not men); *1986 House Hearing*, *supra*, at 147 (testimony by the Washington Council of Lawyers) ("Parental leave for fathers * * * is rare. * * * Where child-care leave policies do exist, men, both in the public and private sectors,

3. *Parental and Med. Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 99th Cong. 33 (1986) [hereinafter *1986 House Hearing*].

receive notoriously discriminatory treatment in their requests for such leave.").

The Ninth Circuit majority acknowledged that the BLS and Yale Bush Center studies addressed only parental leave, not leave to care for a sick family member, but correctly concluded that these studies nevertheless provide evidence of state-sponsored discrimination in granting leave to care for a sick family member. *Hibbs*, 273 F.3d at 859. This is true because both parental and family leave address the same concerns and the failings in both were premised on the identical assumption -- that women should be available to fill the role of caregiver at the expense of their workplace performance. The record before Congress of widespread parental leave policies that expressly discriminated on the basis of gender indicate that this stereotype was very much alive when Congress enacted the FMLA.

d. Prior to the enactment of the FMLA, the States had not led efforts to mandate family medical care leave

The State of Alabama contends in its *amici curiae* brief (Ala. Br. 5-9) that in enacting the FMLA, Congress could not have addressed a history of unconstitutional discrimination by the States because the States were actually leaders in addressing the family and medical leave needs of their employees. In Alabama's view, this was so principally because many States allowed their employees to use sick leave for care of ill family members. This argument is wholly lacking in substance.

Examined more closely, the "flexible" sick leave policies cited by Alabama came nowhere near addressing leave for serious illnesses of family members -- the aim of the family medical care provision of the FMLA. As Alabama

acknowledges (Ala. Br. 6-8), state sick leave allowances used for care of ill family members also included sick leave for the employee. To the extent the sick leave was used for the employee's own illness, there would be none left to care for ill family members. Moreover, even today, only six States specifically provide job protection in their sick leave policies to prevent employees from being penalized for exercising their right to sick leave.[4] And most States with "flexible" sick leave severely restrict the amount of time that may be taken and/or the definition of illness or immediate family member.[5]

For example, in Alabama, state employees accrue four hours of sick leave bi-weekly, or approximately thirteen days of sick leave per year. Further, granting of sick leave to take care of an ill family member is discretionary, not mandatory, and the leave-taker is not guaranteed his or her job upon return from leave. Ala. Admin. Code. 670-X-14-.01 (2001). Other States' "flexible" sick leave policies are similarly limited. Delaware, for example, a signatory to Alabama's brief, allows sick leave to be granted in the event of serious illness to a member of the employee's immediate family, but such sick leave accrues at the rate of only three days per year. Del. Code. Regs. 10-450-002 (2002). In Nebraska, another signatory, there is no job protection. Employees with less than five years on the job accrue twelve days of sick leave per year, and "immediate family member" is narrowly defined and can only be broadened at the discretion of the state agency's head. Neb. Admin. R. & Regs. ch. 9, § 005 (2002).

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4. California, Kentucky, Maryland, Michigan, Minnesota and South Carolina. Cal. Code Regs. tit. 2, § 599.745, 745.1 (2002); 101 Ky. Admin. Regs 2:102, 3:015 (2001); Md. Code Ann., State Pers. & Pens. § 9-505 (1997); Mich. Civ. Serv. Reg. 5.10 (2001); Minn. Stat. § 181.9413 (2000); S.C. Code Ann. Regs. § 19-710.04 (2002).

5. *See* Ala. Br., Appendix 1a-7a (statutes cited therein).

Nor were the States leaders in enacting legislation requiring employers to provide family care leave. A survey of state statutes shows that prior to 1985, when the first precursor to the FMLA was introduced in Congress, thirty-nine States had no state-mandated leave. Of the eleven States that mandated the availability of leave, seven required only that public and private employees provide pregnancy disability leave;[6] neither men nor women had job protection for care of children or sick family members. Even in the other four States that provided for leave, the leave allowed was minimal. Massachusetts allowed women -- not men -- up to eight weeks of leave for the birth or adoption of a child under the age of three. Mass. Gen. Laws Ann. ch. 149, § 105D, ch. 151B, §§ 1(5), 4(11A)(1972). One State, Delaware, mandated the provision of leave only for government employees. Del. Code Ann. tit. 29, § 5116 (1984). Kentucky required the provision of up to six weeks of leave for the adoption of a child for any employees; childbirth leave was not covered by state statute at all. Ky. Rev. Stat. Ann. § 337.015 (1982). Only one State, Illinois, expressly allowed leave for the care of an ill family member, and that leave only protected government employees. Ill. Ann. Stat. ch. 127, § 63b108c (1983).

Implicitly acknowledging how minimally the States had addressed the issue of family care leave prior to Congress's

6. California, Connecticut, Hawaii, Kansas, Montana, New Hampshire, and Washington. Cal. Gov't Code §§ 12945(1)-(2), 12960-75 (1980); Conn. Gen. Stat. §§ 46a-60(a)(7)(B)-(D), 46a-82 to 46a-96 (1973); Hawaii Dep't of Indus. and Labor Relations: Sex and Marital Status Discrimination Regs., 12-23-1 to 12-23-22, 12-23-58, Fair Empl. Practice Manual (BNA) 453:2301-2308, 453:2328 (1982); Kansas Comm'n on Civil Rights, Guidelines on Discrimination Because of Sex, §§ 21-32-6 (D), 21-41-1 to 45-25 (1974); Mont. Code Ann. §§ 49-2-310 to 49-2-311, 49-2-5-1 to 509 (1984); N.H. Rev. Stat. Ann. § 354:A:9-10, N.H. Code Admin. R. Hum. 402.03, 201.01-212.06 (1984); Wash. Admin. Code §§ 162-08-011 to 700, 162-30-020 (1973).

initiative, Alabama argues in its *amici* brief (Ala. Br. 19) that States became "leaders" on these issues "since federal family leave legislation was first introduced." The relevant issue in determining the breadth of the problem Congress sought to address in passing the FMLA, however, is not what States did *after* Congress began considering family and medical leave legislation in 1985, but what they did *before*.

But even by 1993 when the FMLA was enacted, the States were by no means leaders on family medical leave issues. In 1993, thirty-two States did not provide government employees with job-protected leave for the care of an ill family member.[7] Forty-two States still had no legislation mandating private employers to provide leave for the care of an ill family member.[8] Nineteen States still had no statutory job-protected leave -- not even pregnancy disability leave.

7. The eighteen States that did require job-protected leave for government employees for the care of a seriously ill family member were the eight States cited in footnote six that mandated the leave for public and private employees, as well as the following ten states that provided such leave only for public employees: Alaska, Connecticut, Colorado, Florida, Georgia, Hawaii, Illinois, North Dakota, Oklahoma, West Virginia. *See* Alaska Stat. 23.10-500-23.10.550 (1992); Conn. Gen. Stat. Ann. 5-193, *et seq.*; Colo. Code Regs. P7-4-12, *et seq.* (1989); Fla. Stat. Ann. 110-221 (1991); Ga. Code Ann. 45-24-1 through 45-24-9 (1993); Haw. Rev. Stat. 79-32, 398-1 to 398-10 (1992); Ill. Ann. Stat. ch. 127, 63b108c (1983); N.D. Cent. Code 54-52.4 (1990); Okla. Stat. tit. 74, 840.7C (1989); W. Va. Code 21-5D-1 to 21-5D-9 (1989).

8. The eight States that did mandate such leave for private employers were California, Maine, New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin. Cal. Gov't Code 12945(1)-(2) (1991); Me. Rev. Stat. Ann. tit. 26, 844-49 (1991); N.J. Stat. Ann. 34:11B-1 to 34:11B-16 (1990); Or. Rev. Stat. 659.560-570 (1992); R.I. Gen. Laws 28-48-1 to 28-48-10 (1990); Vt. Stat. Ann. tit. 21, 471-474 (1992); Wash. Rev. Code 49.78.020, 49.78.030 (1989); Wisc. Stat. Ann. 103.10 (1988).

Of the States that provided for some sort of leave, twenty States covered both private and government employees;[9] eleven States required that leave be available for government employees only.[10] Additionally, by 1993, Tennessee had adopted a policy mandating the availability of maternity leave for women but not paternity leave for men. Tenn. Code Ann. § 4-21-408 (1988) (leave of up to four months for pregnancy disability and nursing). And, like many States with legislation

9. The twenty States were California, Connecticut, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, Tennessee, Vermont, Washington, and Wisconsin. *See* Cal. Gov't Code 12945(1)-(2) (1991); Conn. Gen. Stat. Ann. 5-193, *et seq.* (1988); Haw. Rev. Stat. 79-32, 398-1 to 398-10 (1992); Iowa Code Ann. 601A.6(2)(e), 601A.15-.17 (1987); Kansas Commission on Civil Rights, Guidelines on Discrimination Because of Sex, 21-32-6 (D), 21-41-1 to 45-25 (1974); Ky. Rev. Stat. Ann. 337.015 (1982); La. Rev. Stat. Ann. 23:10007-08 (1987); Me. Rev. Stat. Ann. tit. 26, 844-49 (1991); Mass. Gen. Law ch. 149, 105D, ch.151B, 1(5), 4(11A)(1972); Minn. Stat. Ann. 181.940-41 (1987); Mont. Code Ann. 49-2-310 to 49-2-311, 49-2-5-1 to 509 (1984); N.H. Rev. Stat. Ann. 354:A:9-10; N.H. Code Admin. R. Hum. 402.03, 201.01-212.06 (1984); N.J. Stat. Ann. 34:11B-1 to 34:11B-16 (1990); Ohio Admin. Code 4112-5-05 (1989); Or. Rev. Stat. 659.560-570 (1992); R.I. Gen. Laws 28-48-1 to 28-48-10 (1990); Tenn. Code Ann. 4-21-408 (1988); Vt. Stat. Ann. tit. 21, 471-474 (1992); Wash. Rev. Code 49.78.020, 49.78.030 (1989); Wisc. Stat. Ann. 103.10 (1988).

10. Alaska, Colorado, Delaware, Florida, Georgia, Illinois, North Carolina, North Dakota, Oklahoma, Pennsylvania, West Virginia. *See* Alaska Stat. 23.10.500-.550 (1992); Colo. Code Regs. P7-4-12, *et seq.* (1989); Del. Code Ann. tit. 29, 5116 (1984); Fla. Stat. Ann. 110-221 (1991); Ga. Code Ann. 45-24-1 through 45-24-9 (1993); Ill. Ann. Stat. ch. 127, 63b108c (1983); NC State Personnel Manual 8 at 19.2-19.3 (1988); N.D. Cent. Code 54-52.4 (1990); Okla. Stat. tit. 74, 840.7C (1989); Pa. Management Directive 505.7, 30.101-30.115 (1986); W. Va. Code 21-5D-1 to 21-5D-9 (1989).

enacted prior to 1985, six States merely required the provision of minimal leave for pregnancy disability.[11]

In short, Alabama's assertion that the States were leaders in granting family medical care leave is illusory. In many States the availability to their own employees of a few days of sick leave to care for family members, often at the state agency's discretion and without specific job protections for exercising such an option, does not demonstrate that States were leaders on family medical care leave issues.

3. The FMLA's Grant of Twelve Weeks Unpaid Leave Annually to Care for Sick Family Members Is a Proportional and Congruent Response to the Problem Congress Sought to Address

In Congress's informed judgment, an objective standard of unpaid family leave, universally available to employees on a gender-neutral basis, is required as an effective means of minimizing discrimination in employment on the basis of gender and promoting equal employment opportunity for men and women. Congress sought to eliminate the discriminatory effects of over a century of unconstitutional employment laws and practices manifest in the widespread failure of state and other employers to provide adequate family care leave. Congress's choice of remedy is congruent and proportional to the problem, and therefore an appropriate exercise of its power to enforce the Fourteenth Amendment.

11. Iowa, Kansas, Louisiana, Montana, New Hampshire and Ohio. *See* Iowa Code Ann. 601A.6(2)(e), 601A.15-.17 (1987); Kansas Commission on Civil Rights, Guidelines on Discrimination Because of Sex, 21-32-6 (D), 21-41-1 to 45-25 (1974); La. Rev. Stat. Ann. 23:10007-08 (1987); Mont. Code Ann. 49-2-310 to 49-2-311, 49-2-5-1 to 509 (1984); N.H. Rev. Stat. Ann. 354:A:9-10; N.H. Code Admin. R. Hum. 402.03, 201.01-212.06 (1984); Ohio Admin. Code 4112-5-05 (1989).

Congress's decision to remedy the effects of past unconstitutional discrimination does not render the FMLA incongruent or disproportional in any way. Congress's power under Section 5 of the Fourteenth Amendment extends to eliminating the effects of past unconstitutional discrimination, not just current purposeful discrimination. As the Court recently observed, "'legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.'" *Lopez* v. *Monterey County*, 525 U.S. 266, 282-283 (1999); *see also City of Rome v. United States*, 446 U.S. 156, 176 (1980) (upholding legislation that prohibits state laws that "perpetuate[d] the effects of past discrimination"); *Gaston County* v. *United States*, 395 U.S. 285 (1969) (otherwise valid literacy tests may be proscribed to combat the disparate effect on voting of past unconstitutional discrimination in education); *South Carolina v. Katzenbach*, 383 U.S. at 334 (observing that Congress could properly enact prophylactic legislation to prohibit voting requirements that would "freeze the effect of past discrimination").

Congress's congruent and proportional response requires leave policies that allow both men and women an equal opportunity to fulfill family care responsibilities. By requiring leave to be granted on a gender-neutral basis, the FMLA "help[s] to eliminate the stereotype -- no longer valid in today's working world -- that women are exclusively responsible for childcare." *1986 House Hearing*, *supra*, at 147; see H.R. Rep. No. 103-8, pt. 2, at 14 ("A policy that affords women employment leave to provide family care while denying such leave to men perpetuates gender-based employment discrimination and stereotyping and improperly impedes the ability of men to share greater responsibilities

in proving immediate physical and emotional care for their families."). It also eliminates the possibility that women would become less attractive candidates for employment if job-protected leave were only available for working mothers. In addition, it reflects Congress's concern for the constitutional limitations on gender-specific relief. While a gender-specific standard might have made it more obvious that Congress was remedying discrimination, "[i]t is of no consequence that Congress *might* have dealt with the effects of [] discrimination" differently; the "formula chosen by Congress was designed to be speedy, objective, and incontrovertible." *Gaston County*, 395 U.S. at 291-292.

By requiring an objective standard of leave with job protection, Congress's response minimizes the opportunity for discrimination that discretionary leave policies, or leave policies without job protection, provide. Such discrimination is difficult to detect, and where the underlying concern is caring for a seriously ill family member, a remedy that requires proof of discrimination is often too little, too late, while the accusation of discrimination is severely disruptive to the workplace environment.

Moreover, the remedy imposed is highly sensitive to the needs of employers. The Act provides for a maximum of twelve weeks of *unpaid* leave. 29 U.S.C. §§ 2612, 2613. The twelve-week period is neither arbitrary nor intrusive; Congress arrived at that number after substantial input from public and private sector employers over eight years of consideration. *See* S. Rep. No. 103-3, at 12-13; *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1164 (2002). The leave provisions apply only to employers having greater than fifty employees and do not require job security for the employers' most highly paid employees. 29 U.S.C. § 2611(3). The Act exempts employees who have not worked for the employer for at least twelve months and a minimum of 1,250

hours. *Id.* § 2611(2)(A). It also requires employees, where feasible, to give employers advance notice and to try to minimize disruption of the employer's operations. *Id.* § 2612(e). Employees must also substantiate, upon request, their family member's serious medical condition. *Id.* § 2613. Moreover, the FMLA is particularly tailored to accommodate the needs of state employers. It does not apply to certain high-ranking or sensitive positions exempt from state civil service laws, such as elected officials or their personal staff, or persons appointed to a policy making or legal advisor role; nor does it cover most state legislative branch employees not subject to state civil service laws. 29 U.S.C. §§ 2611(3); 203(e)(2)(C).

Congress tailored these measures to minimize the economic impact on both public and private employers, while still accomplishing its objectives. In fact, Congress recognized that the costs of the mandatory unpaid leave provisions would be offset by savings resulting from deceased turnover, noting that the net cost of these provisions could be as low as $5.30 to $6.70 per employee per year. *See* S. Rep. No. 103-3, at 16-18; *id.* at 14 (evidence showed that, in the few States that had family leave laws, the mandatory provision of such leave was "neither costly nor burdensome to implement").

Finally, the FMLA encourages States and other employers to adopt more generous leave policies than its provisions mandate. *See Ragsdale*, 122 S. Ct. at 1158-1160. To that end, Congress provided that "[n]othing in this Act * * * shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." 29 U.S.C. § 2651(b); *see also* 29 U.S.C. § 2653 (the FMLA shall not "be construed to discourage employers from adopting or retaining leave

policies more generous" than those in the Act). Thus, the FMLA will not prevent the States from becoming future leaders on family or medical leave policy.

If Section 5 means anything, it is that Congress has the power to develop a simple and effective remedy to the complex problem of ensuring that the Nation's family leave policies are free from the effects of over a century of well-documented gender discrimination. Congress's decision to require the availability of twelve weeks of unpaid family leave for women and men alike represents a reasonable and appropriate exercise of this remedial authority.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Ninth Circuit Court of Appeals and hold that Congress, in enacting the family medical care provision of the FMLA, validly abrogated the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEVADA DEPT. OF HUMAN RESOURCES, *et al.*,
Petitioners,

v.

WILLIAM HIBBS, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 65 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of respondents with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

In this case, the Petitioners challenge Congress' Fourteenth Amendment § 5 authority to enact §102(a)(1)(C) of the Family and Medical Leave Act of 1993 (FMLA), which requires employers—including State employers—to grant workers 12 weeks of annual leave to care for a seriously ill family member. That challenge rests on *City of Boerne v. Flores*, 521 U.S. 507 (1997), and on the claim that in this instance Congress has gone beyond the limit stated there on its § 5 power to enforce the provisions of the Fourteenth Amendment.

The basic *City of Boerne* question is whether Congress' enactment is addressed to a class of behavior made unconstitutional by Fourteenth Amendment § 1 or to a class of behavior made unlawful by Congress that is different in kind and in its dimensions from the behavior made unconstitutional by the Fourteenth Amendment. In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), this Court undertook this Fourteenth Amendment § 5 inquiry with

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

regard to the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) and concluded that that in both instances the enactment was not proper § 5 legislation.

The Petitioners rely upon *Kimel* and *Garrett* here, but those decisions provide no support for their challenge to FMLA § 102(a)(1)(C). *Kimel* and *Garrett* hold that the ADEA and the ADA were not appropriate Fourteenth Amendment § 5 enactments because both were addressed not to elaborating a Fourteenth Amendment prohibition but to defining a new, distinct, statutory prohibition. The *Kimel* and *Garrett* Courts, after reviewing the relevant Fourteenth § 1 precedents, concluded that, on a correct understanding of the Fourteenth Amendment law, the ADEA and the ADA, in their terms and in their likely applications, were not directed against a class of behavior made unconstitutional by the Fourteenth Amendment but rather against classes of behavior made unlawful by Congress that are not unlawful under the Fourteenth Amendment.

While the ADEA and the ADA were addressed to age and disability discrimination, FMLA § 102(a)(1)(C) is addressed to the very different matter in Fourteenth Amendment § 1 terms of "remedy[ing] and prevent[ing] unconstitutional *gender* discrimination," in particular gender discrimination that rests on the stereotype that "women . . . hav[e] the primary responsibility for family caretaking" and are, for that reason, "less attractive job candidates than men." Pet. App. 13a (emphasis added). And, while there is no Fourteenth Amendment § 1 prohibition on age and disability discrimination, as such, under this Court's interpretation of the Fourteenth Amendment, government actions that rest on gender stereotypes, like those that rest on racial stereotypes, are unconstitutional, as such.

That this Court has so construed Fourteenth Amendment § 1 goes to the essence of the *City of Boerne* question presented here. Given the scope and nature of the Fourteenth Amendment prohibition on gender stereotype discrimination, congressional enactments aimed at remedying or preventing such discrimination are most certainly *not* enactments that "effect a substantive redefinition of the Fourteenth Amendment," *Kimel*, 528 U.S. at 81, but rather enactments that, under this Court's interpretation of the Fourteenth Amendment, effectuate "the heart of the Constitution's guarantee of equal protection," *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 136, 152-153 (1994) (Kennedy, J., concurring), quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

That conclusion brings into play the well-settled rule that Congress has Fourteenth Amendment § 5 authority to effectuate the Fourteenth Amendment § 1 guarantees against racial or gender discrimination through a legislative "approach to the problem [that] is a rational one." *Oregon v. Mitchell*, 400 U.S. 112, 284 (1971) (Opinion of Stewart, J.). And, as this Court has recognized, one such rational approach is to "adopt prophylactic rules to deal with . . . situations" that "threaten [Fourteenth Amendment] principles of equality." *Richmond v. J.A. Croson Co.*, 499 U.S. 469, 490 (1989). FMLA § 102(a)(1)(C) is just such legislation in that it "counteract[s] the various problems for gender equality in public and private workplaces created by workplace policies that reflect traditional, formerly state-supported assumptions about gender roles in the domestic and public spheres" and "deter[s] future intentional discrimination against women based on those same stereotypes." Pet. App. 38a.

ARGUMENT

The conflicting opinions of the Fifth Circuit in *Kazmier v. Widmann*, 225 F.3d 519 (2000), and of the Ninth Circuit in this case frame the question presented here, *viz.*, whether

Congress has Fourteenth Amendment § 5 authority to enact §102(a)(1)(C) of the Family and Medical Leave Act of 1993 (FMLA), which requires employers—including State employers—to grant workers 12 weeks of annual leave to care for a seriously ill family member. We, therefore, begin by outlining first the Fifth Circuit's—and then the Ninth Circuit's—analysis of this question. We then go on to show that it is the Ninth Circuit decision holding that FMLA § 102(a)(1)(C) is a proper Fourteenth Amendment § 5 enactment—and the dissent from the Fifth Circuit's *Kazmier* decision—that rest on a correct understanding of this Court's Fourteenth Amendment § 5 jurisprudence.

1. (a) The Fifth Circuit's *Kazmier* analysis rests on the proposition that a showing that the FMLA is "rationally related to deterring sex discrimination" is not sufficient to establish "the validity of its purported abrogation of State sovereign immunity." 225 F.3d at 530. Indeed, the *Kazmier* court could not see any relevant distinction in terms of Congress' § 5 authority between legislation addressed to gender discrimination and legislation addressed to age discrimination. *Id.* In the Fifth Circuit's view, what is required to sustain the Fourteenth Amendment § 5 validity of any and all kinds of anti-discrimination legislation is a "legislative record" that "contains evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions." *Id.* at 524 (emphasis in original).

Applying this "stringent standard of review," the Fifth Circuit held that "[t]he mere invocation by Congress of the specter of sex discrimination . . . is insufficient to support the validity of legislation under Section 5, at least when the statute at issue prohibits the States from engaging in a significant amount of conduct that is constitutional." 225 F3d. at 526. It is dispositive, said the *Kazmier* majority, that "in enacting the FMLA, Congress identified no pattern

of discrimination by the States with respect to the granting of employment leave for the purpose of providing family care." *Id.*

(b) By contrast, in the Ninth Circuit's view, the FMLA § 102(a)(1)(C)'s focus on "remedy[ing] and prevent[ing] unconstitutional gender discrimination," Pet. App. 13a—as opposed to remedying and preventing age or disability discrimination—is the key to assessing its validity under the Fourteenth Amendment § 5.[2] That is so, because "state-sponsored gender discrimination [as opposed, for example, to age or disability discrimination] is presumptively unconstitutional." *Id.* at 18a.

As the court below pointed out, the "rebuttable presumption of unconstitutionality for state-sponsored gender discrimination . . . contrasts sharply with the treatment of age and disability classifications, which are subject to rational

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[2] The Ninth Circuit found that FMLA § 102(a)(1)(C) addresses the problem that "women are regarded as having the primary responsibility for family caretaking" and, for that reason, are regarded by employers as "less attractive job candidates than men." Pet. App. 13a (internal quotation marks omitted). This form of gender discrimination in employment has a basis in "a long history of unconstitutional legislation mandating stereotypical family roles." *Id.* Thus, "by setting a gender-neutral minimum standard for the granting of caretaking leave," *id.*, in the FMLA, "Congress appropriately sought to counteract the various problems for gender equality in public and private workplaces created by workplace policies that reflect traditional, formerly state-supported assumptions about gender roles in the domestic and public spheres" and "to deter future intentional discrimination against women based on those same stereotypes," *id.* at 38a.

We believe that the Ninth Circuit's characterization of FMLA § 102(a)(1)(C) as gender discrimination legislation is eminently correct and, in order to concentrate on the proper analysis of the general Fourteenth Amendment § 5 question presented by legislation addressed to gender discrimination, rather than making our own presentation on FMLA § 102(a)(1)(C) we merely associate ourselves with the presentations of the Respondent and of the United States on that point.

basis review." Pet. App.14a. And, as is true of the related area of race discrimination, "the heightened scrutiny applied to state-sponsored gender discrimination reflects judicial recognition of the fact that persons who suffer discrimination on the basis of gender have been 'subjected to a history of purposeful unequal treatment.'" *Id.* at 18a, quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

Given the scope and nature of the Fourteenth Amendment § 1 guarantees against gender discrimination and race discrimination and the "history of purposeful unequal treatment" in violation of those guarantees, the Ninth Circuit concluded that Congress has Fourteenth Amendment § 5 authority to address the "'[d]ifficult and intractable problems'" gender discrimination poses by implementing "'powerful remedies,' which may include 'reasonably prophylactic legislation.'" Pet. App. 15a, quoting *Kimel*, 528 U.S. at 88. Thus, in contrast to legislation that is aimed at remedying or preventing age or disability discrimination, "section 5 legislation that is intended to remedy or prevent gender discrimination [like FMLA § 102(a)(1)(C)] is presumptively constitutional." Pet. App.18a.

2. The Fifth and Ninth Circuits' wholly different analytic approaches lead us back to the language and structure of the Fourteenth Amendment and to a direct consideration of this Court's Fourteenth Amendment decisions.

Section 1 of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." And, § 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this [Amendment]." As this Court read those provisions in *City of Boerne v. Flores*, 521 U.S. 507, 522 (1997), § 1 of the Fourteenth Amendment "impose[s] self-executing limits on the States," while in § 5, "Congress [i]s granted the power to make the substantive constitutional prohibitions against the States effective."

By its terms, "§ 5 is an affirmative grant of power to Congress," *Kimel*, 528 U.S. at 80, of a protean nature that the Court has "equated . . . with the broad powers expressed in the Necessary and Proper Clause, U.S. Const., Art. I, § 8, cl. 19," *Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980). As the Court added, "in no organ of government, state or federal, does there repose a more comprehensive remedial power than the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 483. Thus, "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference. *Katzenbach v. Morgan*, 384 U.S., at 651." *City of Boerne*, 521 U.S. at 536.

At the same time—and this is the primary concern here—"[a]s broad as congressional enforcement power is, it is not unlimited." *City of Boerne*, 521 U.S. at 518 (internal quotation marks and citation omitted). The critical limit, said the *City of Boerne* Court, is that "Congress' power under § 5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment," and "Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519. In other words, Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* While Congress has the § 5 power to enact "appropriate remedial legislation," Congress does not have a § 5 power to enact legislation that "effects a substantive redefinition of the Fourteenth Amendment." *Kimel*, 528 U.S. at 81.

The limit of Congress' Fourteenth Amendment § 5 authority and the logic of the resulting "appropriate remedial legislation"/"substantive redefinition of the Fourteenth Amendment" dichotomy lead to the conclusion that the basic *City of Boerne* question is whether Congress' enactment is addressed to a class of behavior made unconstitutional by

Fourteenth Amendment § 1 or to a class of behavior made unlawful by Congress that is different in kind and in its dimensions from the behavior made unconstitutional by the Fourteenth Amendment.

If there is congruence between the class of behavior addressed by a congressional enactment and a class of unconstitutional behavior under Fourteenth Amendment § 1—if the legislation can be "understood as responsive to, or designed to prevent . . . behavior" that this Court has identified as "unconstitutional behavior" under the Fourteenth Amendment, *Kimel*, 528 U.S. at 86—then the answer to the *City of Boerne* question is that the enactment is, indeed, "appropriate [§ 5] remedial legislation." Where that is true, what remains, giving Congress the deference it is due in exercising its comprehensive remedial power, is whether the legislation is a "rational means to effectuate the constitutional prohibition." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

If, however, the legislation is addressed to a class of behavior that is both different in kind and significantly broader than any this Court has identified as an unconstitutional class of behavior under the Fourteenth Amendment, that lack of congruence generates a second step inquiry into whether "the substantive requirements the [enactment] imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the [statute]." *Kimel*, 528 U.S. at 83. This second step empirical inquiry considers whether the statute is *in fact* focused on a demonstrated pattern of unconstitutional behavior by the States.

In ultimate terms, if this two step analysis shows that the enactment is addressed to a class of behavior that is neither congruent to a class of behavior made unconstitutional by the Fourteenth Amendment nor proportional to a pattern of unconstitutional behavior by the States, the conclusion that

follows is that the enactment is legislation that effects a substantive redefinition of the Fourteenth Amendment's prohibitions and, as such, is beyond Congress' § 5 authority.

3. *Kimel v. Florida Bd. of Regents, supra*, and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), essay this Fourteenth Amendment § 5 inquiry with regard to the Age Discrimination in Employment Act and the Americans with Disabilities Act.

In *Kimel*, the Court considered whether Congress' extension of the Age Discrimination in Employment Act (ADEA) to the States—thereby "mak[ing] it unlawful for an employer, including a State 'to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age.' 29 U.S.C. § 623 (a)(1)"—"exceeded Congress' authority under § 5 of the Fourteenth Amendment." 528 U.S. at 66 & 67. As the Court emphasized, "The ADEA makes unlawful, in the employment context, all 'discriminat[ion] against any individual . . . because of such individual's age.' 29 U.S.C. § 623(a)(1)." *Id.* at 86. In other words, the ADEA is addressed to age discrimination as a class of behavior.

That being so, in determining whether the ADEA was "'appropriate legislation' under § 5 of the Fourteenth Amendment," the *Kimel* Court focused on the question of whether Fourteenth Amendment § 1 prohibits age discrimination, as such. The Court began by reviewing three cases that "considered claims of unconstitutional age discrimination under the Equal Protection Clause," each of which "held that the age classification at issue did not violate the Equal Protection Clause." 528 U.S. at 82-83. Those case demonstrate, said the Court, that "age is *not* a suspect classification under the Equal Protection Clause," and that the "States *may* discriminate on the basis of age without offending the

Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Id.* at 83 (emphasis added).

Under Fourteenth Amendment § 1, then, "an age classification is presumptively rational," and "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests," even if "age proves to be an inaccurate proxy in any individual case." 528 U.S. at 84. Indeed, the "Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Id.*

The ADEA, in contrast, treats employment differentiations on the basis of age—differentiations that § 1 of the Fourteenth Amendment treats as presumptively constitutional—as categorically unlawful.[3] Given that disparity, the Court

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[3] Indeed, the *Kimel* petitioners attempted, without any success, to defend the ADEA's application to States on the ground "that the Act's prohibition, considered together with its exceptions, applies only to arbitrary age discrimination, which in the majority of cases corresponds to conduct that violates the Equal Protection Clause." 528 U.S. at 86. In this regard, the petitioners relied upon the ADEA's "bona fide occupational qualification" (BFOQ) defense and on the provision "permit[ting] employers to engage in conduct otherwise prohibited by the Act 'where the differentiation is based on reasonable factors other than age.'" *Id.* at 88 & 89.

As to the first of these exceptions, the *Kimel* Court noted that "the [ADEA's BFOQ] defense is a far cry from the rational basis standard . . . appl[ied] to age discrimination under the Equal Protection Clause," because "[t]he BFOQ standard adopted in the statute is one of 'reasonable necessity,' not reasonableness." 528 U.S. at 86-87. Thus, "[u]nder the ADEA, even with its BFOQ defense, the State's use of age is prima facie unlawful." *Id.* at 87. And, "[a]lthough it is true that the existence of the BFOQ defense makes the ADEA's prohibition of age discrimination less than absolute, the Act's substantive requirements nevertheless remain at a

concluded that "the ADEA prohibits very little conduct likely to be held unconstitutional." *Id.* at 88. And, given that conclusion it followed that the ADEA in its own terms makes unlawful a class of behavior—age discrimination, as such—that is different in kind and in dimension from the class of behavior—irrational age discrimination—made unconstitutional by the Fourteenth Amendment.

To be sure, the ADEA's age discrimination prohibition does encompass the Fourteenth Amendment § 1 prohibition on *irrational* age discrimination. And, the *Kimel* Court regarded that conjunction as one that called for an inquiry into whether the ADEA was so focused on vindicating the latter right that the Act was, in practical terms, "reasonably prophylactic legislation" addressed to a "[d]ifficult and intractable [Fourteenth Amendment] problem[]." 528 U.S. at 88. The *Kimel* Court treated that question as one that necessitated an empirical investigation. And, the Court found that "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." *Id.* at 91. While noting that "lack of support [in the legislative record] is not determinative," the Court then reached the ultimate conclusion that "Congress' failure to uncover any significant

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level akin to [the] heightened scrutiny cases under the Equal Protection Clause." *Id.* at 87-88.

The Court next turned to the ADEA's permission to engage in otherwise prohibited conduct on the basis of "factors other than age." Far from saving the statute, the Court found that "[t]his exception confirms . . ., rather than disproves, the conclusion that the ADEA's protection extends beyond the requirements of the Equal Protection Clause." 528 U.S. at 88. This so, the Court explained, because "[t]he exception simply makes clear that the employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly," while "[u]nder the Constitution, in contrast, States may rely on age as a proxy for other characteristics." *Id.* (internal brackets, quotations marks and citation omitted).

pattern of unconstitutional [age] discrimination confirms that Congress had no reason to believe that broad prophylactic legislation was necessary *in this field*." *Id.* (emphasis added).

The *Kimel* Court's holding, therefore, was two-fold: first, "[i]n light of the indiscriminate scope of the Act's substantive requirements, and [second, in light of] the lack of evidence of widespread and unconstitutional age discrimination by the States, . . . the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment." 528 U.S. at 91.

Board of Trustees v. Garrett, *supra*, treats with an enactment that parallels the ADEA—the Americans with Disabilities Act (ADA)—and does so in a decision that parallels the *Kimel* decision. In *Garrett*, the Court considered Congress' Fourteenth Amendment § 5 authority to extend to the States the ADA's categorical prohibition on "[employment] discriminat[ion] against a qualified individual with a disability," including the failure to "mak[]e reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability." 531 U.S. at 360-361. Thus, just as the ADEA is addressed to age discrimination as a class of behavior, the ADA is addressed to disability discrimination as a class.

As in *Kimel*, the *Garrett* Court's "first step" was "to examine the limitations § 1 of the Fourteenth Amendment places upon States' treatment of the disabled," relying upon "prior decisions under the Equal Protection Clause dealing with this issue." 531 U.S. at 365. These prior decisions had rejected the contention that disability "qualified as a 'quasi-suspect' classification." *Id.* at 366. Instead, governmental action on the basis of disability "incurs only the minimum 'rational-basis' review applicable to general social and economic legislation." *Id.* And, "[u]nder rationalbasis review, where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to

implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Id.* at 366-367, quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985).

Thus, "the States are not required by the Fourteenth Amendment [§ 1] to make special accommodations for the disabled, so long as their actions toward such individuals are rational." 531 U.S. at 367. And, a decision to "hold to job-qualification requirements which do not make allowance for the disabled" is, in these terms, "rational," even if "hardhearted[]." *Id.* at 368. Given this disparity between the class of behavior—irrational disability discrimination—that Fourteenth Amendment § 1 renders unconstitutional and the class of behavior—disability discrimination, as such—that the ADA renders unlawful, the ADA, like the ADEA, enacts a congressionally established prohibition that is different in kind and in its dimensions than the Fourteenth Amendment § 1 prohibition.

That being so, the *Garrett* Court, following the lead of *Kimel*, went on to consider whether the statute was, in fact, so focused on unconstitutional disability discrimination as to make it "reasonably prophylactic legislation" addressed to a "[d]ifficult and intractable [Fourteenth Amendment] problem[]." *Kimel*, 528 U.S. at 88. As was the case with the ADEA, the *Garrett* Court concluded that the ADA was not supported by evidence of a pattern of unconstitutional disability discrimination by the States. 531 U.S. at 369-372.

On the basis of the foregoing, the *Garrett* Court concluded that "to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by th[e] Court['s prior decisions]." 531 U.S. at 374.

In sum, the ADEA and the ADA were not appropriate Fourteenth Amendment § 5 enactments because both were addressed not to elaborating a Fourteenth Amendment

prohibition but to defining a new, distinct statutory prohibition. The *Kimel* and *Garrett* Courts concluded that, on a correct understanding of the Fourteenth Amendment § 1 law, the ADEA and the ADA, in their terms and in their likely applications, were not directed against a class of behavior made unconstitutional by the Fourteenth Amendment but rather against classes of behavior made unlawful by Congress that are not unlawful under the Fourteenth Amendment.

4. While the ADEA and the ADA were addressed to age and disability discrimination, FMLA § 102(a)(1)(C) is addressed to the very different matter in Fourteenth Amendment § 1 terms of "remedy[ing] and prevent[ing] unconstitutional *gender* discrimination," in particular gender discrimination that rests on the stereotype that "women . . . hav[e] the primary responsibility for family caretaking" and are, for that reason, "less attractive job candidates than men." Pet. App. 13a (emphasis added). And, as we now show, while there is no Fourteenth Amendment § 1 prohibition on age and disability discrimination, as such, there is a well-established Fourteenth Amendment § 1 prohibition on gender stereotype discrimination, as such.

The historical circumstances that led to the enactment of the Fourteenth Amendment make it plain that "[r]ace is the paradigm." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). And, history demonstrates that gender is also a salient Fourteenth Amendment equal protection category.

"[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994), quoting *Frontiero v. Richardson*, 511 U.S. 677, 685 (1973). "[N]ot until 1920 did women gain a constitutional right to the franchise," and "for a half century thereafter, it remained the prevailing doctrine that government, both federal and state,

could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination." *United States v. Virginia*, 518 U.S. 515, 531 (1996). And, "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and perhaps most conspicuously in the political arena." *Frontiero*, 411 U.S. at 686.

Taking into account this "long and unfortunate history of sex discrimination," this Court has "conclude[d] that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect," *Frontiero*, 411 U.S. at 686 & 688, and require "an 'exceedingly persuasive justification'" to pass muster under the Fourteenth Amendment, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Under this Court's interpretation of the Fourteenth Amendment, government actions that rest on gender stereotypes, like those that rest on racial stereotypes—and in contrast to government actions that rest on age or disability stereotypes—are unconstitutional, as such. "[I]f the [state actor's] objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Mississippi University for Women*, 458 U.S. at 725. *See, e.g., id.* at 726 n. 11("gender-based classification . . . based upon traditional assumptions that 'the female [is] destined solely for the home and the rearing of the family'" is invalid).

Simply stated, "[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females,'" even notions that reflect the "average capacities or preferences of men and women." *U.S. v. Virginia*, 518 U.S. at 541, quoting *Mississippi University for Women*, 458 U.S. at 725. This rule against gender stereotype discrimination is

"a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. at 149 (O'Connor, J., concurring). *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) ("a criterion barred to the Government by history and the Constitution").

That this Court has so construed the Fourteenth Amendment goes to the essence of the *City of Boerne* question presented here. Given the scope and nature of the Fourteenth Amendment prohibition on gender stereotype discrimination, congressional enactments aimed at remedying or preventing such discrimination are most certainly *not* enactments that "effect a substantive redefinition of the Fourteenth Amendment," *Kimel*, 528 U.S. at 81, but rather enactments that, under this Court's interpretation of the Fourteenth Amendment, effectuate "the heart of the Constitution's guarantee of equal protection," *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. at 152-153 (Kennedy, J., concurring), quoting *Metro Broadcasting, Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting).

5. That conclusion brings into play the well-settled rule that Congress has Fourteenth Amendment § 5 authority to effectuate the Fourteenth Amendment § 1 guarantees against racial or gender discrimination through a legislative "approach to the problem [that] is a rational one." *Oregon v. Mitchell*, 400 U.S. 112, 284 (1971) (Opinion of Stewart, J.). *See id.* at 217 (Opinion of Harlan, J.) ("the choice which Congress made was within the range of the reasonable"). The scope and nature of Congress' § 5 power to "identify and redress the effects of [these forms of] society-wide discrimination," *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.), is illustrated by this Court's decision in *Fullilove v. Klutznick, supra*.

In *Fullilove*, the Court reviewed a federal "minority business enterprise" (MBE) program that granted preferences for "members of statutorily identified minority groups" in

obtaining contracts to provide services or supplies to federally funded state and local projects. 448 U.S. at 453-454. The Court's "analysis proceed[ed] in two steps." *Id.* at 473. The first step of that analysis, which is the one pertinent here, "inquire[d] whether the *objectives* of this legislation are within the power of Congress." *Id.* (emphasis in original).[4]

The *Fullilove* Court determined "that the objectives of the MBE program are within the power of Congress under § 5 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." 448 U.S. at 476. In so holding, the Court recognized that the MBE program was *not* directly addressed to "any intentional discrimination or other unlawful conduct" in the letting of public contracts, *id.* at 478, but rather went "beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination," *id.* at 477. The MBE program did so by altering "traditional procurement practices [that], when applied to minority businesses, could perpetuate the effects of prior discrimination" in order "to ensure that [minority] businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of laws." *Id.*

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[4] The second step in the *Fullilove* analysis addressed "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives." 448 U.S. at 473. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). This aspect of *Fullilove* is not implicated by the FMLA, because that statute addresses the problem of gender stereotyping in a manner that avoids employing any suspect classifications. *See Adarand*, 515 U.S. at 212-213 (program that attempts to overcome disadvantages without using classifications such as race is subject to "the most relaxed judicial scrutiny"). *See also id.* at 230-231 (reserving the question of whether § 5 grants Congress broader authority to employ racial classifications when it is enforcing the Fourteenth Amendment).

Fullilove underscores two points that are highly pertinent here:

First, where Congress is acting to vindicate the Fourteenth Amendment § 1 guarantees against racial or gender discrimination, "Congress[] need *not* make specific findings of discrimination" as a predicate for exercising its Fourteenth Amendment § 5 enforcement authority but may act on the basis of "a nationwide history of past discrimination." *Richmond v. J.A. Croson Co.*, 488 U.S. at 489 & 488 (emphasis added). *See also Oregon v. Mitchell*, 400 U.S. at 216 (Opinion of Harlan, J.) ("Despite the lack of evidence of specific instances of discriminatory application or effect, congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious.") & 284 (Opinion of Stewart, J.) ("Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box."). Thus, the Fifth Circuit could not have been more wrong when it said in *Kazmier* that legislation addressed to remedying and preventing gender stereotype discrimination can be sustained as proper Fourteenth Amendment § 5 legislation only where there is a "legislative record . . . contain[ing] evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions." 225 F.3d at 524 (emphasis in original).

Second, "where Congress has authority to declare certain conduct unlawful, it may . . . authorize and induce state action to avoid such conduct." *Fullilove*, 448 U.S. at 484. This enforcement authority "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those

situations." *Richmond v. J.A. Croson Co.*, 488 U.S. at 490 (emphasis in original). *See Katzenbach v. Morgan*, 384 U.S. 641 (1966).[5]

Given the well-established equal protection jurisprudence regarding gender discrimination, there is no doubt whatsoever that Congress' Fourteenth Amendment enforcement authority extends to enacting legislation that categorically prohibits states from making employment decisions on the basis of "archaic and stereotyped notions" concerning "the roles of males and females." *Mississippi University for Women*, 458 U.S. at 724-725. Congress has done so by the 1972 amendments extending the coverage of the Title VII of the Civil Rights Act of 1964 to the States. And, "in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), . . . [t]he Court held that this extension of Title VII was an appropriate method of enforcing the Fourteenth Amendment." *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

That being so, as *Fullilove* makes clear, Congress has the additional authority to "adopt prophylactic rules to deal with . . . situations" that "threaten [Fourteenth Amendment] principles of equality." *Richmond v. J.A. Croson Co.*, 499 U.S. at 490. FMLA § 102(a)(1)(C) is just such legislation in that it "counteract[s] the various problems for gender equality in public and private workplaces created by workplace policies that reflect traditional, formerly state-supported assumptions about gender roles in the domestic and public

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[5] In *Katzenbach v. Morgan*, the Court approved a provision of the Voting Rights Act mandating that graduates of "American-flag schools in which the predominant language was other than English" be exempted from the otherwise valid English-language preconditions for registering as a voter. 384 U.S. at 652. The Court sustained this provision on the grounds that it could be seen as a reasonable method of forestalling discrimination against Puerto Ricans in the provision of social services by the State of New York. *Id.* at 652-653.

spheres" and "deter[s] future intentional discrimination against women based on those same stereotypes." Pet. App. 38a.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,
Petitioners,

v.

WILLIAM HIBBS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* SENATORS CHRISTOPHER DODD AND EDWARD M. KENNEDY, AND REPRESENTATIVES PATRICIA SCHROEDER, MARGE ROUKEMA AND GEORGE MILLER IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Senators and Representatives are fifty-one current and former Members of Congress, many of whom played leadership roles in the development and passage of the Family and Medical Leave Act ("FMLA"), and all of whom are committed to securing equal opportunity for women in the workplace. *Amici* have a strong interest in providing this Court with information regarding Congress's efforts to exercise its power, under § 5 of the Fourteenth Amendment, to remedy and deter gender discrimination by the States through enactment of the FMLA.

SUMMARY OF ARGUMENT

The FMLA is the culmination of eight years of congressional examination of the significance of employee leave policies and their impact on women, families, and employers. It reflects Congress's considered judgment that the anti-discrimination mandates of prior legislation had not fully remedied the effects of pervasive and longstanding employment discrimination against women, including discrimination by the States. Congress memorialized this determination in one of the five express purposes of the FMLA, "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] clause" of the Fourteenth Amendment. 29 U.S.C. § 2601(b)(5). Congress had authority to require State employers to provide leave to care for a family member with a serious health condition, as required by § 2612(a)(1)(C) of the Act ("family leave"), and to provide a damages remedy to enforce that requirement, because those measures serve to

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici* and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

vindicate a core promise of the Equal Protection Clause that women and men have equal employment opportunity.

This Court consistently has recognized that § 5 of the Fourteenth Amendment "is an affirmative grant of power to Congress." *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000). Where, as here, Congress acts to remedy and deter state-sponsored gender discrimination that is unquestionably prohibited by the Fourteenth Amendment, "[i]t is for Congress, in the first instance, to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Id.* at 80-81 (internal quotations omitted). Indeed, this Court has repeatedly reaffirmed that Congress's "authority both to remedy and to deter violation of rights" guaranteed by the Equal Protection Clause confers upon Congress discretion to prohibit even conduct that "is not itself forbidden by the Amendment's text." *Id.* at 81; *see, e.g.*, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Because the FMLA's leave requirement and damages enforcement provisions reasonably relate to Congress's goal of remedying and deterring gender-based employment discrimination, they fall well within the scope of Congress's authority under § 5.[2]

In arguing that Congress is powerless to impose a damages remedy against the States for failure to afford the family leave required by the Act, petitioners and those *amici* States that support them err in two fundamental respects. First, they misread the Court's precedents concerning Congress's § 5 authority. In the cases on which they principally rely, this Court determined that the legislation at issue did not attempt to remedy and deter discriminatory conduct that the Court had previously acknowledged to fall within the core of the Equal Protection Clause. The Court viewed the legislation instead as an attempt by Congress "to determine what constitutes a constitutional violation" in the first place, and thus to "effect[]

[2] We limit our views here to Congress's § 5 power to enact the FMLA. We express no position concerning Congress's other powers.

a substantive redefinition of the Fourteenth Amendment right at issue." *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997); *Kimel*, 528 U.S. at 81. For that reason, the Court applied a searching "'congruence and proportionality' test" to determine whether the legislation fell within Congress' § 5 power. *Id.*; *see also Bd. of Trs.* v. *Garrett*, 531 U.S. 356 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627 (1999).

Here, by contrast, this Court has long held that gender is a suspect classification requiring heightened judicial scrutiny, *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981), and has repeatedly confirmed "a history and pattern of unconstitutional . . . discrimination by the States" on the basis of gender, including gender-based employment discrimination. *Garrett*, 531 U.S. at 368; *see also United States* v. *Virginia*, 518 U.S. 515, 531 (1996) ("volumes of history" document state action "denying rights or opportunities based on sex"); *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) ("statute books gradually became laden with gross, stereotyped distinctions between the sexes"); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 193-94 n.7 (1974); *Goesaert* v. *Cleary*, 335 U.S. 412 (1908). Because remedying and deterring discrimination on the basis of gender is at the core of Congress's power under § 5, petitioners err in suggesting that Congress was required to develop the sort of detailed legislative record of state-sponsored discrimination that the Court has required when Congress has legislated in other areas not involving discrimination by the States against a suspect class.

Second, and in all events, petitioners and their *amici* err in arguing that the legislative record here is inadequate to support a damages remedy against the States for violating the family leave requirement. Congress's record here is consistent with its understanding of what is required for § 5 legislation and comparable to the record of prior enforcement legislation involving suspect classes. Even as against the

searching review that petitioners would have this Court apply, the record confirms that the FMLA is "appropriate legislation" under § 5. Congress enacted the FMLA against a backdrop not only of judicial precedent finding state responsibility for gender-based employment discrimination, but against its own decades-long efforts to remedy that discrimination. From the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, through the Proposed Equal Rights Amendment, the Pregnancy Discrimination Act of 1978, and amendments to some of these laws, Congress has repeatedly attempted to remedy and deter state-sponsored gender discrimination. The legislative record of the FMLA reveals Congress's recognition that additional legislation was needed to bring about "equal employment opportunity for women and men," and illustrates why the FMLA is a congruent and proportional response to that need.

ARGUMENT

I. THE FMLA IS APPROPRIATE FOURTEENTH AMENDMENT LEGISLATION TO REMEDY AND DETER GENDER DISCRIMINATION.

Section 5 of the Fourteenth Amendment confers on Congress comprehensive remedial power to guarantee the equal protection of the laws. Congress acts within the core of this power when it creates remedies against the States for discrimination on the basis of classifications, like gender and race, that have long been used to perpetuate invidious discrimination. Congress permissibly exercised its core power in creating the FMLA's damages and leave provisions.

A. Congress Enacted The FMLA Pursuant To Its Fourteenth Amendment Power.

Petitioners argue that, in passing the FMLA, Congress acted pursuant to its Commerce Clause power alone. Pet. Br. at 17. Yet Congress explicitly acknowledged in the text of the statute that it also enacted the FMLA pursuant to its

Fourteenth Amendment power. In the Act's "Findings and Purposes" section, Congress set forth five distinct purposes. The final one – which petitioners notably fail to mention in their brief, *see id.* at 10-11, 22 (citing 29 U.S.C. § 2601(b)(1)-(4)) – was "to promote the goal of equal employment opportunity for women and men, *pursuant to* such clause [the Equal Protection Clause of the Fourteenth Amendment]." 29 U.S.C. § 2601(b)(5) (emphasis added). The legislative history confirms that purpose.[3] The fact that there were additional purposes, some of which may have been unrelated to enforcing the equal protection guarantee, in no way vitiates Congress's express reliance on the Fourteenth Amendment as a source of its power to enact the FMLA.

Petitioners raise four additional arguments to question Congress's intent. First, petitioners contend that, because Title VII and the PDA already forbid leave-based gender discrimination, Congress could not have been acting to remedy gender discrimination through the FMLA. Pet. Br. at 24. Yet the existence of those statutes demonstrates only that Congress had previously undertaken other measures to remedy leave-based discrimination. It does not show that those statutes exhausted the range of possible remedies. As the House Report makes explicit, Congress enacted the FMLA to supplement Title VII and the PDA. *See* H.R. Rep. No. 103-8, pt. 2, at 10-11 (1993). While acknowledging that the effects of those laws in remedying gender discrimination were "far-reaching," the Report explained that the FMLA was "designed to fill those gaps" that a formal "anti-discrimination law [or a law simply mandating equal treatment] by its nature cannot fill." *Id.*

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[3] *See, e.g.*, H.R. Rep. No. 103-8, pt. 2, at 10-11 (1993) (FMLA, like Title VII and the Pregnancy Discrimination Act, promotes the goal of equal employment opportunity); S. Rep. No. 103-3, at 16 (1993) (FMLA is based on Fourteenth Amendment equal protection guarantee); *see also supra* Part II.

Second, petitioners contend that Congress's efforts "to strike a balance between the benefits and costs of leave," establish that the FMLA is "social-policy legislation, not anti-discrimination legislation." Pet. Br. at 23-24. But whenever Congress considers new legislation, including anti-discrimination legislation, Congress attempts to strike a balance between expected costs and benefits. For example, Congress extensively debated the costs to employers of the Pregnancy Discrimination Act, *see, e.g.*, H.R. Rep. No. 95-948, at 9-10 (1978); *id.* at 16 (dissenting views); S. Rep. No. 95-331, at 9-11 (1977), yet no one could reasonably question that it was anti-discrimination legislation. That Congress considered the potential costs to employers of the leave requirement establishes only that Congress acted responsibly, not that it failed to enact an anti-discrimination law.

Third, petitioners assert that the FMLA was not aimed at remedying "bias with respect to women" because Congress was "equally concerned" about the impact of leave policies on men and women. Pet. Br. at 24-25. Yet petitioners overlook Congress's express recognition that those who suffered most from no-leave policies – and therefore those who would benefit most from the FMLA – were working women. *See* 29 U.S.C. § 2601(a)(5) ("the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men").[4] Petitioners also overlook Congress's awareness that leave requirements applicable only to women could perpetuate the very discriminatory stereotypes and practices that Congress sought to remedy and deter. *See, e.g.*, S. Rep. No. 103-3, at 16; H.R. Rep. No. 103-8, pt.1, at 29 (1993). That the FMLA provides

[4] *See, e.g.*, 139 Cong. Rec. H388 (1993) (statement of Rep. Mink) ("Women will be the greatest beneficiary of this bill."); 137 Cong. Rec. S502 (1991) (statement of Sen. Mitchell) ("[I]t is primarily women . . . who would reap the most benefit from enactment of a family leave policy.").

a gender-neutral remedy thus supports, rather than undermines, the legitimacy of Congress's reliance on its § 5 power.

Finally, petitioners contend that Congress's chief concern was with private sector leave policies, and thus "Congress needed only to apply the standard to private employers." Pet. Br. at 25. But that contention takes issue only with the wisdom of Congress's decision to apply the requirements to the States. It has no bearing on whether Congress was legislating pursuant to its § 5 power. Because, Congress clearly intended the FMLA to apply to the States, *see* Pet. Br. at 9 n. 2, petitioners' final contention is irrelevant.[5]

B. Congress Has Broad § 5 Power To Remedy And Deter Gender Discrimination By The States.

Petitioners concede Congress's power to create injunctive remedies against State employers for violation of § 2612(a)(1)(C), and thus effectively challenge only Congress's authority also to provide damages remedies against state employers. Pet. Br. at 3-4. This challenge fails. To remedy and deter gender discrimination, Congress has authority both to require the States, as employers, to provide job-protected leave to employees, and to provide a damages remedy for the enforcement of that requirement.

Gender discrimination, like race discrimination, is at the core of Congress's enforcement power under the Fourteenth Amendment. Congress acts within this core when it legislates to counteract those forms of discrimination that have long

[5] Petitioners' reliance (Br. 21, 26) on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is similarly misplaced because the question in *Pennhurst* was whether Congress intended a statute to apply to the States, not Congress's constitutional authority to enact a statute. *EEOC* v. *Wyoming*, 460 U.S. 226, 244 n. 18 (1983). Where, as here, there is no ambiguity about Congress's intent to make a statute applicable to the States, "the observations in *Pennhurst*" about not quickly attributing to Congress an unstated intention to enforce the Fourteenth Amendment "simply have no relevance." *Id.*

been used arbitrarily and invidiously to maintain certain groups in "condition[s] of inferiority." *Ex parte Virginia*, 100 U.S. 339, 344-45 (1879). This Court has concluded that there has been a history of such discrimination against suspect groups. Indeed, the Court's suspect class jurisprudence is premised on the fact that some groups, on the basis of characteristics like race and gender, have suffered a "'history of purposeful unequal treatment'" that is "'so seldom relevant to the achievement of any legitimate state interest.'" *Kimel*, 528 U.S. at 83 (citations omitted). When Congress creates remedies against the States to counter discrimination against suspect groups, it is acting within the core of its § 5 power.

This Court's foundational exposition of Congress's enforcement powers under the Civil Rights Amendments is set forth in *Ex parte Virginia*, which upheld, as appropriate § 5 legislation, federal criminal penalties against state officers who excluded jurors on the basis of race. Rejecting the dissent's objection, in part, to Congress's broad "exercise [of] coercive authority over judicial officers of the States in the discharge of their duties under State laws," 100 U.S. at 358 (Field, J., dissenting), the Court stated:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the [civil rights] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46.

In accordance with that standard, this Court consistently and frequently has recognized Congress's broad latitude to design powerful remedial and preventive measures to combat race discrimination. In *South Carolina* v. *Katzenbach*, for example, this Court upheld "stringent" federal remedies that

addressed racial discrimination in voting. 383 U.S. 301, 315 (1966). The remedies, *inter alia*, prohibited state conduct that was not itself unconstitutional, such as the use of literacy tests or any other voting qualifications, and placed affirmative obligations on States to secure federal preclearance review of any new voting rule, and to amend state voting lists at the instruction of federal examiners. *See id.* at 317-23.

As petitioners note, these remedies were not imposed nationwide or indefinitely. Pet. Br. at 36-37. Nevertheless, the Court did not hold that Congress was required to legislate in a targeted fashion. Expressly applying the *Ex parte Virginia* standard, the Court reiterated that, "[a]s against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination." *South Carolina*, 383 U.S. at 324 (emphasis added). In subsequent cases, the Court has confirmed that Congress is not limited to targeted remedies in combatting race discrimination.

In *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), for example, this Court unanimously upheld federal legislation that extended the ban on literacy tests approved in *South Carolina* to every State in the nation. *See id.* at 118 (op. of J. Black). The Court deferred to Congress's determination that a nationwide ban was appropriate, even though the tests themselves were not unconstitutional, and even though "most States d[id] not have literacy tests." *See id.* at 147 (Douglas, J., concurring in the judgment in part and dissenting in part). Because race discrimination is "a serious *national* dilemma that touches every corner of our land," *id.* at 133 (op. of J. Black), the Court held that Congress had authority to ban every State from using literacy tests in an effort to remedy and deter race discrimination.[6]

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[6] *See* 400 U.S. at 134-35; *id.* at 216 (Harlan, J., concurring in part and dissenting in part) ("Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests

Lopez v. *Monterey*, 525 U.S. 266 (1999), also undermines petitioners' narrow interpretation of Congress's § 5 power. There, the Court upheld the application of the federal preclearance review requirement to a new California voting law, as that law was to be implemented in a covered county, even though there was no indicia that the State had ever engaged in racial discrimination in voting. *See id.* at 282-85. In so holding, the Court acknowledged the "substantial" costs of permitting such intrusions into sensitive state policymaking, but explained that Congress's enforcement authority extends to prohibiting practices that have only a discriminatory effect. *Id.* at 282-83.[7]

Congress has similar authority to implement strong remedial and prophylactic measures against gender discrimination. This Court has repeatedly recognized that gender discrimination, like race discrimination, has been, and continues to be, a recurring basis for the denial of the Fourteenth Amendment's guarantee of equal protection. *See United States* v. *Virginia*, 518 U.S. at 531 ("[O]ur nation has had a long and unfortunate history of sex discrimination." (internal quotations omitted)). Indeed, this Court has recently struck down discriminatory state policies and practices that reflect and perpetuate misguided stereotypes about women's (and men's) abilities. *See, e.g., id.* at 557; *J.E.B.* v. *Ala. ex rel. T.B.*, 511 U.S. 127, 138-46 (1994). And this Court has explicitly acknowledged that women have suffered harms comparable,

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unduly lend themselves to discriminatory application, either conscious or unconscious."); *id.* at 284 (Stewart, J., concurring in part and dissenting in part) (rejecting requirement of state-by-state findings and acknowledging that "nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country").

[7] *South Carolina* and *Lopez* involved Congress's power under the 15th Amendment. *Oregon* v. *Mitchell* considered Congress's power under the 14th and 15th Amendments. This Court has construed Congress's powers under the two Amendments as coextensive. *See City of Rome* v. *United States*, 446 U.S. 156, 176-77 (1980).

in significant ways, to those suffered by racial minorities at the hands of discriminatory state actors. *See id.* at 135-36.

Consistent with its power to remedy and deter race discrimination, therefore, Congress has broad power to remedy and deter gender discrimination. Its conclusion that job-protected leave and a damages remedy for the denial of that leave are appropriate to enforce the equal protection guarantee is thus "'entitled to much deference,'" *Kimel*, 528 U.S. at 81 (citation omitted), and should be upheld so long as it is a "rational means," *South Carolina*, 383 U.S. at 324, of achieving Congress's goal. Here, it is clear that the FMLA satisfies that standard. By requiring state employers to provide all of its employees with the same amount of leave and providing a damages remedy to enforce that requirement, the FMLA precludes the discriminatory allocation of leave based on gender, and deters state employers from making discriminatory hiring or promotion decisions on the assumption that only women, and not men, can or will take leave. Whether Congress could have chosen a more narrowly tailored means to remedy and deter state-sponsored gender discrimination is legally irrelevant. Because the FMLA rationally deters unconstitutional gender discrimination, it is "appropriate legislation" under § 5.

2. Petitioners primarily rely on the Court's more recent § 5 cases – *City of Boerne*, and its progeny – and their application of the congruence and proportionality test to argue that Congress may not authorize damages suits under the FMLA. Pet. Br. at 30-38. Yet those cases do not purport to limit Congress's broad remedial power recognized in the Court's earlier cases. This Court has applied the congruence and proportionality analysis to evaluate remedies targeted at problems that the Court has not previously recognized as matters of heightened Fourteenth Amendment concern. The Court has not employed it to evaluate the constitutionality of Congress's § 5 remedies against the States to combat race or gender discrimination. Nor has this Court previously required

Congress to compile a detailed record of a pattern or practice of gender or race discrimination by a State as a prerequisite to regulating that State's conduct under § 5.

The Court first set forth the congruence and proportionality analysis in *City of Boerne*, which struck down a law that heightened judicial scrutiny for laws incidentally burdening religion. 521 U.S. at 507, 515. The Court used that analysis to guide its evaluation of a law that it found redefined, or "alter[ed] the meaning of," rather than "enforce[d]," the Fourteenth Amendment's due process guarantee. *Id.* at 519. Acknowledging the difficulty of discerning whether a law actually redefined Fourteenth Amendment rights, the Court looked to whether there was a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

Each of the subsequent cases that has applied the congruence and proportionality analysis similarly involved legislation that sought to remedy constitutional problems that the Court had not previously identified to be of heightened § 5 concern. In *Florida Prepaid*, for example, Congress sought to enforce due process guarantees by remedying patent violations. 527 U.S. at 630. In *Kimel*, 528 U.S. at 66-67, and *Garrett*, 531 U.S. at 360-61, Congress sought to enforce equal protection guarantees by remedying age and disability discrimination, respectively. Here, by contrast, the congruence and proportionality analysis is unnecessary because there is no question that, in order to enforce the Equal Protection Clause, Congress may design strong remedial and preventive measures against the States to prevent discrimination against suspect classes. Indeed, consistent with this reasoning, *Lopez*, a post-*City of Boerne* case which upheld race discrimination legislation as an appropriate exercise of the § 5 power, did not even mention the congruence and proportionality analysis.

In any event, petitioners misread the Court's decisions when they argue for strict application of the congruence and

proportionality analysis here. When the Court has applied that analysis, it has made clear that the requisite "fit" between means and ends varies depending on "the evil presented." *City of Boerne*, 521 U.S. at 530; *see also id.* ("Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."). "Difficult and intractable problems often require powerful remedies," even those that "prohibit[] very little conduct likely to be held unconstitutional." *Kimel*, 528 U.S. at 88; *see also City of Boerne*, 521 U.S. at 526-27 (acknowledging Congress's authority to enact "strong remedial and preventive measures" in response to the nation's history of race discrimination). As the targeted harm becomes increasingly difficult to prevent or remedy, the congruence and proportionality test establishes that the fit required between means and ends, and hence the deference accorded to Congress, correspondingly broadens.

Because gender discrimination is a "difficult and intractable" problem, Congress may create powerful prophylactic and remedial measures against the States pursuant to its § 5 power. It was thus unnecessary for Congress to compile the sort of legislative record that documents in detail a pattern or practice of intentional discrimination by the States of the precise conduct to be regulated. *See id.* at 531 ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but on due regard for the decision of the body constitutionally appointed to decide." (internal quotations omitted)); *Fla. Prepaid*, 527 U.S. at 646 ("lack of support in the legislative record is not determinative"); *Garrett*, 531 U.S. at 375-76 (Kennedy, J., concurring) (judicial opinions are indicia of the seriousness and extent of problem).

United States v. *Morrison*, 529 U.S. 598 (2000), is not to the contrary. The Court there held that legislation authorizing victims of gender-motivated violence to bring federal civil actions against their perpetrators as a means of remedying gender discrimination by the States, was inappropriate § 5

legislation. *See id.* at 605, 619-20. The basis for that holding was the Court's conclusion that § 5 authorizes remedies against only States or state actors, not private individuals. *See id.* at 625-26. Insofar as the Court applied the congruence and proportionality test, the Court stressed the lack of congruence: the challenged provision "is directed not at any State or state actor" and "visits no consequence whatever on any . . . public official." *Id.* at 626. Although the Court discussed the law's nationwide application, the question of the requisite degree of proportionality for gender discrimination remedies against the States was not at issue. *See id.* at 625-27.

Accordingly, because gender discrimination is already well-recognized as a difficult and intractable problem, Congress did not have to – though it did – compile a detailed legislative record of intentionally discriminatory policies and practices to justify its authority to create powerful remedial and preventive measures. In sum, the FMLA is a rational means of remedying and preventing gender discrimination, and is thus an appropriate exercise of Congress's § 5 power.

II. THE LEGISLATIVE RECORD CONFIRMS THAT THE FMLA IS APPROPRIATE LEGISLATION UNDER § 5.

The petitioners and their state *amici* are, in any event, incorrect in asserting that the legislative record of the FMLA does not demonstrate that the family leave and damages provisions are a congruent and proportional response to the continuing problem and effects of state-sponsored gender discrimination. The relevant record – which spans four decades of congressional effort to address and eliminate gender discrimination – confirms, even under petitioners' proposed legal standard, that the challenged provisions are "appropriate legislation" under § 5.

A. Congress Enacted The FMLA After Extensive Efforts To Remedy Gender Discrimination.

The "'constitutional propriety'" of the Family and Medical Leave Act of 1993 "'must be judged with reference to the historical experience . . . it reflects.'" *City of Boerne*, 521 U.S. at 525 (omission in original) (quoting *South Carolina*, 383 U.S. at 308); *see also Fla. Prepaid*, 527 U.S. at 640. Before enacting the FMLA, Congress had long explored the problem of unequal employment opportunities for women and men caused by this nation's long history of gender discrimination, and had undertaken substantial efforts to remedy this difficult and intractable problem. Indeed, only after 40 years of experience with other remedial measures, including measures targeting the States, did Congress determine it was necessary and appropriate to enact the FMLA. This extensive experience with the problem of gender discrimination, which informed Congress's decisions in crafting and passing the FMLA, is directly relevant to an assessment of whether the FMLA is a proper exercise of Congress's § 5 power.

1. Beginning in 1963, Congress enacted a series of statutes to combat widespread gender discrimination in the workplace. First, through the Equal Pay Act, Congress prohibited gender-based wage differentials for work that required "equal skill, effort, and responsibility." Pub. L. No. 88-38, § 3, 77 Stat. 56, 57 (1963). The basis for that legislation was Congress's determination that "[t]he wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a women even though his duties are the same." S. Rep. No. 88-176, at 1 (1963). One year later, in Title VII of the Civil Rights Act of 1964, Congress expanded the prohibition on gender discrimination to apply more generally to all aspects of the employment relationship. *See* Pub. L. No. 88-352, § 703, 78 Stat. 253, 255 (1964) (prohibiting discrimination in hiring or discharging, or in the "terms, conditions, or privileges" of employment).

Nearly 15 years later, in response to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), that Title VII does not cover pregnancy discrimination, Congress amended Title VII to clarify that "sex discrimination" includes discrimination on the basis of pregnancy or childbirth. Pregnancy Discrimination Act of 1978, § 1, Pub. L. No. 95-555, 92 Stat. 2076, 2076 ("PDA"). Through the PDA, Congress attempted to remedy the "persistent and harmful effect" on women's employment opportunities resulting from stereotypes that limited women to the roles of mother and caretaker, and not worker. H.R. Rep. No. 95-948, at 6; *id.* at 6-7 ("Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant."); *id.* at 3 ("[T]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs."). Employers, for example, "forc[ed] women who bec[a]me pregnant to stop working regardless of their ability to continue," "set arbitrary time limits" before which women could "not return to work," and refused "to credit women with accumulated seniority after a pregnancy disability leave on the same terms applicable to other persons absent from work for other disabilities." S. Rep. No. 95-331, at 6.

Beyond enacting anti-discrimination legislation to prevent ongoing discrimination, Congress also instituted measures to remedy the persistent effects of historical discrimination. In as early as 1956, for example, Congress amended the Social Security Act to allow women to eliminate three more low-earning years from the computation of her "average monthly wage" than could a similarly situated man. *See* Social Security Amendments of 1956, Pub. L. No. 880, sec. 102(a), § 216(a), 70 Stat. 807, 809. The purpose of the provision, which remained in effect until 1972, was "to remedy

discrimination against women in the job market." *Califano* v. *Webster*, 430 U.S. 313, 319 (1977) (discussing legislative history). Such a purpose was legitimate, this Court explained, in light of "the disparity in economic condition between men and women caused by the long history of discrimination against women." *Id.* at 317.

2. In 1972, Congress undertook efforts to target the States directly for their long-standing role in denying women equal employment opportunities. First, Congress passed the Equal Rights Amendment, which provided, in relevant part, that "[e]quality of rights under the law shall not be denied or abridged . . . by any state on account of sex." Proposed Equal Rights Amendment, § 1, 86 Stat. 1523, 1523 (1972). Proposed in nearly every session of Congress since 1923, the Amendment was the subject of voluminous hearings, much of which focused on the States' "protective" labor laws.[8] Enacted in nearly every State in the nation, such laws regulated, *inter alia*, women's hours (*e.g.*, no overtime), schedules (*e.g.*, no working at night), and activities (*e.g.*, no heavy lifting) in the workplace. *See, e.g., 1971 Hearings*, at 192-93 (reprint of *Women's Legal Rights in 50 States*, McCall's). As the Senate Report explained, "[m]any of these laws are not protective at all, but are restrictive, and have been shown to have a discriminatory impact when applied only to women." S. Rep. No. 92-689, at 9 (1972). In addition, the Report pointed to laws restricting women's ability to contract and to enter certain professions as well as government employment practices as further evidence of "states discriminat[ing] invidiously against women." *Id.* at 8.

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[8] *See, e.g., Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208, and Related Bills and H.R. 916 and Related Bills Before the House Comm. on the Judiciary*, 92d Cong. *passim* (1971) ("*1971 Hearings*"); *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Sen. Comm. on the Judiciary*, 91st Cong. *passim* (1970); *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Sen. Comm. on the Judiciary*, 91st Cong. *passim* (1970).

Second, also in 1972, Congress amended Title VII to extend its prohibition on employment discrimination to the States. In discussing the need for the bill, the House and Senate Reports stressed the continuing "profound economic discrimination against women workers," as evidenced by, *inter alia*, striking income disparities between men and women and persistent gender segregation in job opportunities. H.R. Rep. No. 92-238, at 4-5 (1971); S. Rep. No. 92-415, at 7-8 (1971). While primarily recounting studies detailing State employment practices involving race discrimination, the Reports nonetheless emphasized Congress's duty under the Fourteenth Amendment "to insure that all citizens are treated equally" and to prohibit all unconstitutional forms of State employment discrimination, including discrimination "because of . . . sex." S. Rep. No. 92-415, at 9-11; H.R. Rep. No. 92-238, at 17-19. The Reports also pointed to the "pervasive" discrimination faced by women in educational institutions—many of which were under State and local control. H.R. Rep. No. 92-238, at 19; *see* S. Rep. No. 92-415, at 12 (noting, *inter alia*, underrepresentation of women as scholars in institutions of higher learning and as principals in elementary and secondary schools).

3. Over the next two decades, these legislative efforts led to significant improvements in women's employment opportunities. Yet, in 1991, after extensive hearings and debate, Congress concluded that "much remains to be done." H.R. Rep. No. 102-40, at 15 (1991). Congress had learned, for example, that women "still earn[ed] on average only *two-thirds* of what white males earn[ed]," and that "roughly half of this earnings gap may [have] be[en] attributable to discriminatory employment practices." *Id.* at 20 (emphasis in original). Not only was there "substantial sex segregation" between occupations or job titles, but "in nearly every occupation women earn[ed] less than men." *Id.* Accordingly, Congress again amended Title VII, *inter alia*, to extend its application to State employees appointed by elected officials,

Civil Rights Act of 1991, Pub. L. No. 102-166, § 321, 105 Stat. 1071, 1097, and to provide a damages remedy for intentional gender discrimination, *id.* sec. 102, § 1977, 105 Stat. at 1072.

B. The FMLA Is A Congruent And Proportional Response To Gender Discrimination By States.

The FMLA originated against this background of extensive legislative efforts to remedy and prevent gender discrimination. Congress had concluded that its prior and "far-reaching" legislative efforts had not been fully effective in remedying and preventing discrimination against women in the workplace. *See supra*, at 5. By mandating minimum employee leave, Congress sought to eradicate the remaining and persistent inequality in the workplace. To that end, as shown below, Congress carefully studied the significance of discretionary or no-leave policies for equal employment opportunity, and concluded that a minimum-leave obligation and a damages remedy for its enforcement was an appropriate response to the continuing denial of such opportunity. In reaching that conclusion, Congress had before it substantial evidence that the FMLA's leave requirements would enforce the Fourteenth Amendment's equal protection guarantee by remedying the persistent effects of prior state-sponsored gender discrimination, and remedying and deterring ongoing gender discrimination by the States.

The FMLA is the product of almost a decade of investigation and deliberation. The initial version of the FMLA was introduced in 1985. During the next eight years, Congress held extensive hearings and debates, issued numerous reports, and drafted numerous versions of the bill, all of which Congress relied upon when it finally enacted the FMLA in 1993. *See* H.R. Rep. No. 103-8, pt. 1 (referencing, throughout report, hearings from earlier Congresses); S. Rep. No. 103-3 (same). This legislative record confirms that the FMLA is a congruent and proportional response to past and ongoing state-sponsored gender discrimination

1. In enacting the FMLA, Congress had before it substantial evidence demonstrating that past state-sponsored gender discrimination accounted, in significant part, for the disproportionate adverse impact on women of employer policies denying family and medical leave. First, Congress had before it evidence of this nation's long history of mandating separate "work" and "home" spheres for men and women, respectively, and of denying women the choice to enter the workforce on a par with men. For example, Congress heard testimony that "[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women's place is in the home"[9] and also "to the pervasive assumption that women are mothers first, and workers second."[10] "This prevailing ideology about women's roles," a witness explained, "has in turn justified discrimination against women when they are mothers or mothers-to-be."[11] The debates and reports also reveal that members of Congress were acutely aware that the viability of no-leave policies in the past depended on maintenance of separate spheres for men and women. *See, e.g.*, 137 Cong. Rec. H9714 (1991) (statement of Rep. Clay) (no-leave policies premised on "[t]he so-called traditional family, in which the father went to work while the

[9] *See, e.g., The Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 100th Cong. 235 (1987) ("*1987 Labor Hrgs*") (statement of Women's Legal Defense Fund ("WLDF")).

[10] *The Parental and Medical Leave Act of 1986: Joint Hearings Before the Subcomm. on Labor Management Standards of the House Comm. on Education and Labor*, 99th Cong. 100 (1986) ("*1986 Labor Hrgs.*") (statement of WLDF).

[11] *1986 Labor Hrgs* at 100; *see also id.* at 36, 42 & n. 48 (statement of National Women's Political Caucus) (history of special legal protections that "put women, not on a pedestal, but in a cage" (internal quotations and citations omitted)).

wife stayed home to raise the kids").[12] On this basis, it was reasonable for Congress to conclude that the disproportionate impact of no-leave policies on women, who continue to assume most of a family's caretaking duties, reflects the continuing effect of past discriminatory policies by the States, and thus may be remedied through the Fourteenth Amendment.

Second, Congress had evidence that the continuing wage disparities between men and women, a result in part of this nation's long history of gender discrimination, also led to the disproportionate adverse effect of no-leave policies on women. As one hearing witness explained, "[t]he fact that women typically earn so much less than men contributes to the gender gap in caregiving. When work absences are required, it makes sense for the lower earner to take them."[13] Another witness confirmed, when there is a conflict between employment and caregiving, "the lowest paid earner in the two-earner family – usually the women – quits her job."[14] Thus, Congress had a reasonable basis to conclude that no-leave policies exacerbate the continuing effects of wage disparities attributable in significant part to decades of state-sponsored gender discrimination, and that a minimum leave requirement would help remedy those effects.

[12] *See also, e.g.*, 139 Cong. Rec. S1000 (1993) (statement of Sen. Mikulski) (no-leave policies "pretend" we "still live in an Ozzie and Harriet world"); *id.* at S1139 (statement of Sen. Reigle) (no-leave policies based on circumstances "[e]arlier this century, [when] most families had one parent who went to work everyday to feed his – usually the primary income earner in a family was a male – wife and children); *id.* at H423 (statement of Rep. Mineta) (no-leave policies premised on "the idealized family paragons of Ward and June Cleaver" of "the 1950's"); H.R. Rep. 103-8, pt. 1, at 17; S. Rep. No. 103-3, at 7.

[13] *The Family and Medical Leave Act of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 102d Cong. 128 (1991) ("*1991 Hrgs*") (statement of American Association of Retired Persons ("AARP"))

[14] *1991 Hrgs* at 219 (statement of Martha McSteen, National Committee to Preserve Social Security and Medicare).

Third, Congress had before it evidence that, in light of the continuing segregation of women into lower-paying jobs – another legacy of state-sponsored gender discrimination – allowing State employers to institute no-leave policies undermined women's equal protection guarantees. As the House Report explained, many women workers "remain in female intensive, relatively low paid jobs and are less likely than men to have adequate job protections and benefits." H.R. Rep. 101-28, pt. 1, at 6 (1989); *see also* S. Rep. No. 102-68, at 36 (1991) ("[T]he availability and scope of current family leave policies are severely limited for those in lower paying jobs."); *Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Comm. on Labor and Human Resources* (pt. 2) 100th Cong. 314 (1987) ("*1987 Children Hrgs(2)*") (statement of Illinois Women's Agenda) ("[M]ost maternity leaves are individual arrangements made by women with enough clout to negotiate with their bosses. Lower-paid, less skilled employees – those most in need of economic protection at the time of childbirth – are the least likely to get it.").[15] On the basis of that evidence, it was reasonable for Congress to conclude that affirmative leave obligations would help remedy the disparity between female workers and male workers in access to job-protected leave, which in turn is

[15] *See also1987 Children Hrgs(2)* at 454 (statement of Edna Jackson, National Black Women's Health Project) (historically black and Hispanic women "have been concentrated in low skilled, poorly compensated and nonprofessional jobs such as sales, service, clerical, crafts or light manufacturing. Seldom are these jobs the jobs with adequate provisions for paid leave, family health conditions or child care"); *The Family and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Civil Serv. and Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Serv.*, 99th Cong. 34 (1986) ("*1986 Civil Serv. Hrg*") (statement of Meryl Frank, Yale-Bush Ctr. in Child Development and Social Policy) ("most women are employed by small employers and most women are not in management positions, so they are very often not given these sorts of benefits [flexible policy and parental leave]").

partly a consequence of previous governmental discrimination in employment.

Fourth, Congress had before it evidence that instituting affirmative leave obligations would remedy, in a gender-neutral manner, the suppression of women's earnings caused by the long history of governmental gender discrimination. Congress examined studies showing that "[i]n the absence of a family leave standard, childbirth and the need to care for a sick child or parent have an adverse impact on women's earnings," S. Rep. No. 102-68, at 28, and that working women without job-protected leave lost 86% of their pre-birth earnings after childbirth while women with leave lost only 51%. *See* S. Rep. No. 103-3, at 15-16. Congress also heard testimony that the absence of leave "worsens existing inequalities between male and female pay, and it raises the incidence of unemployment among women."[16] Such evidence amply supports Congress's conclusion that requiring States to provide job-protected leave would remedy the persistent adverse impact on women's wages caused by prior governmental discrimination, and would thereby promote women's equal employment opportunities.

In short, the foregoing evidence reveals that Congress had an adequate evidentiary basis for concluding that no-leave policies were a form of gender discrimination in that they had

[16] *Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Comm. on Labor and Human Resources* (pt. 1) 100th Cong. 81 (1987) ("*1987 Children Hrgs(1)*") (statement of Karen Nussbaum, Service Employees Int'l Union and 9 to 5, National Association of Working Women); *see also 1987 Children Hrgs(2)* at 638 (statement of Institute for Women's Policy Research) (proposed Family and Medical Leave Act "can be one small step in reducing inequity between the sexes"); *1986 Labor Hrgs*, at 61 (statement of Irma Finn Brosseau, National Federation of Business and Professional Women's Clubs, Inc.) (persistence of economic disparities between men and women results mainly from women's primary responsibility for child-rearing, and "society preclud[ing] men from sharing this obligation" (citing Stanford University study)).

the inevitable effect of denying women equal opportunities in the workforce, and that that effect was in significant part a direct consequence of previous state-sponsored gender discrimination. Accordingly, in light of the fact that nearly every State, until only a generation ago, placed discriminatory restrictions on women's ability to participate in the workplace, *see supra* at 17, the FMLA's minimum leave obligations are a congruent and proportional response to the continuing effects of past nationwide gender discrimination.

2. Congress also had before it substantial evidence to support the conclusion that the FMLA is a congruent and proportional response to ongoing gender discrimination by the States. Evidence showed that merely prohibiting employers from discriminating in the conditions and terms of employment, as Congress had done in Title VII and the PDA, was inadequate to prevent the "fairly flagrant" discrimination in the availability of leave. Such evidence was abundant with respect to the private sector.[17] Evidence of discriminatory leave policies and practices was also substantial with respect to the public sector, including the State employment sector.

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[17] *See, e.g.*, H.R. Rep. No. 100-511, pt. 2, at 24 (1988) ("[D]espite the apparent conflict with Title VII of the Civil Rights Act, only 37 percent of the[ ] companies extended parental leave to fathers and often on a different (and less extended) basis than to mothers"); *see also* S. Rep. No. 103-3, at 14-15 (noting 37% availability of "maternity" leave at businesses with more than 100 workers, compared to only 18% availability of "paternity" leave); *1987 Children Hrgs(2)* at 536 (1987) (statement of Prof. Susan Deller Ross, Georgetown University Law Center) ("[T]here are a number of studies . . . in which it's shown that employers in this country that are giving family leaves to their workers are not giving it non-discriminatorily, they are, by and large, giving it only to women, not to men. It's fairly flagrant discrimination"); *1986 Labor Hrgs* at 101 n. 2 (statement of WLDF) ("In a recent study by Catalyst, an independent research firm, 51.8% of companies surveyed reported that they give parental leave to mothers, but only 37% reported that they provide such leave to fathers—even though such a sex-based differential clearly violates existing law."); *id.* at 237 (Bureau of National Affairs Report) (case studies of gender discrimination in parental leave grants).

For example, States discriminated on the basis of gender in permitting family leave, with 13 States granting family leave to women and not to men.[18] Congress also had before it substantial evidence about the prevalence of discretionary leave policies that, while not discriminatory on their face, could be applied in a discriminatory manner.[19]

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[18] *See Family and Medical Leave Act of 1989: Hearings on H.R. 770 Before the Subcomm. on Labor-Management Relations*, 101st Cong. 271 (1989) (statement of the Concerned Alliance of Responsible Employers); *see also 1987 Children Hrgs(2)*, at 364-74 (testimony of Elaine Gordon, Member of the Florida House of Representatives) (leave is granted only to female public employees in Florida, and Florida rejected extending such leave to men); *1987 Children Hrgs(1)* at 385 (testimony of Gerald McEntee, International President, American Federation of State, County, and Municipal Employees) ("[T]he vast majority of our [public employment] contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave."); *Parental and Medical Leave Act of 1986: Hearings on H.R. 4300 Before the Subcomm. on Labor Management Standards*, 99th Cong. 30 (1986) (testimony of Meryl Frank, Yale Bush Center Infant Care Leave Project) ("We found that public sector leaves don't vary very much from private sector leaves" [expand]); *id.* at 90 (statement of Barbara Easterling, Communications Workers of America) (reaching same conclusion for their "public and private sector [union] members"); *id.* at 147 (statement of the Washington Council for Lawyers) ("[M]en, both in the public and private sectors, receive notoriously discriminatory treatment in their request for such leave."); 139 Cong. Rec. H399 (1993) (remarks of Rep. Bishop) (recounting receiving complaints from people "who were employed in State government and who were employed in the private sector").

[19] *See 1987 Children Hrgs(1)* at 35 (statement of James T. Bond, National Council of Jewish Women) (discretionary leave policies, unlike policies providing standard benefits, "introduce[] uncertainty and place[] some workers at considerable risk."); *1986 Civil Service Hrgs.*, at 85 (Staff Report, Subcommittee on Civil Service, Committee on Post Office and Civil Service) (same); *1986 Labor Hearings*, at 211 (Catalyst, Report on a National Study of Parental Leaves) ("Even among companies that currently offer unpaid leaves to men, many thought it unreasonable for men to take them. Fully 41% of companies with unpaid leave policies for men did not sanction their using the policy . . . .").

Most importantly, the evidence strongly demonstrated that the availability of gender-specific leave policies – and especially leave policies applicable only to women – could have the perverse and debilitating effect of exacerbating employment discrimination against women and reducing their job opportunities. The evidence showed that "it's particularly important that this medical leave would apply to both sexes for all medical conditions" because otherwise "you do give an employer an incentive not to hire those pregnant women."[20] Congress also found that employers were often unwilling to hire or promote women because of stereotypical conceptions about women's proper roles as caretakers, rather than workers.[21] In extending family leave to all eligible

[20] *1987 Children Hrgs(2)*, at 535 (statement of Prof. Susan Deller Ross, Georgetown University Law Center); *see also* S. Rep. No. 102-68, at 35 ("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability"); *1986 Labor Hrgs*, at 35 (statement of Irene Natividad, National Women's Political Caucus) ("[P]arental leave without medical leave would encourage discrimination against women of child-bearing age . . . . Employers would tend to hire men, who would have less legal protection."); *id.* at 108-09 (statement of WLDF) ("[B]ecause employers would be required to provide job-protected leaves for all employees in circumstances that affect them all approximately equally, they would have no incentive to discriminate against women.").

[21] *See, e.g.*, 138 Cong. Rec. H8227 (1992) (statement of Rep. Hayes) ("Too often women experience the nightmare of going in to their employer with the news that they are pregnant. Although they are valued employees, up to the moment they became pregnant, suddenly they find themselves unwanted."); *1987 Children Hrgs(2)*, at 173-74 (statement of Peggy Montes, Chicago Mayor's Commission on Women's Affairs) ("Job opportunities for [women with children] are limited, and they often miss pay increases and promotions. The lack of uniform parental and medical leave policies in the work place has created an environment where discrimination is rampant. Very often we are contacted by women workers who are at risk of losing their jobs or have lost them because they

employees, male and female, and therefore ensuring that men, too, can undertake caretaking roles, the FMLA counteracts those debilitating stereotypes that perpetuate job discrimination against women.[22]

Finally, Congress had before it evidence of the substantial burdens on litigants to bring suit. *See* 139 Cong. Rec. H387 (1993) (statement of Rep. Ackerman) (discussing difficulty of bringing suit to obtain leave). That evidence, combined with the evidence of persistent leave discrimination, provided a sufficient basis for Congress to conclude that the hurdles to bringing leave discrimination suits were too substantial, and that an across-the-board gender-neutral leave obligation was an appropriate supplement to Title VII and the PDA. *Cf. South Carolina*, 383 U.S. at 314 (upholding legislation requiring States to submit election law changes to federal review in light of, *inter alia*, "the ineffectiveness of the existing voting rights laws and the slow, costly character of case-by-case litigation") (citation omitted); *accord City of Boerne*, 521 U.S. at 526.

Petitioners contend that there was no pattern of unconstitutional conduct by the States because Congress knew that some States had adopted "innovative" family-care leave laws. Pet. Br. 32-34. Yet Congress also knew that most States had not done so. The House Report indicated that 29

are pregnant, [or] gave birth to a child . . . ."); *1986 Labor Hrgs*, at 100 (statement of WLDF).

[22] *See, e.g., 1986 Labor Hrgs* at 147 (statement of Washington Council of Lawyers) (the FMLA "help[s] eliminate the stereotype—no longer valid in today's working world—that women are exclusively responsible for childcare"); *1987 Children Hrgs(1)*, at 468 (statement of Advisor to the [MA] Governor on Women's Issues) ("[B]y including fathers, you begin the process of making it so that employers won't really think, 'Oh, if I hire a woman, then I'm going to lose here [sic] when she has a baby.'"); *1987 Children Hrgs(2)*, at 194 (statement of Sen. Donna Peterson, Minnesota State Senate) ("[T]he likelihood of someone discriminating against the woman is reduced because the father is now also entitled [to leave]").

States had not enacted leave laws to care for a sick family member (as opposed to care for a new child only), and, of those 29, 14 had "no Family and Medical Leave Act whatsoever." *See* H.R. Rep. No. 103-8, pt. 1, at 66 (Minority Views). Congress also received testimony from various state representatives about the inadequacy of state leave policies and the need for federal legislation. *See 1987 Children Hrgs(2)* at 359 (statement of Rep. Nan Orrock, Georgia General Assembly) ("[S]tate-by-state efforts to achieve the same results would be at best uneven and very slow . . . . [I]n Georgia, I see no motion underway that could result in the establishment of such [parental leave] rights on the state level in the foreseeable future"); *id.* at 380-82 (statement of Kentucky Commission on Women) (noting absence of Kentucky leave law and supporting federal legislation).

Among the laws that did exist, moreover, their scope and coverage were "widely divergent." S. Rep. 102-68, at 40 ("Currently, the right to job protection related to pregnancy and childbirth could be a 'reasonable period of time' or six weeks or four months, depending on the state in which the mother works. The present system is a patchwork of widely divergent laws . . . ."); *see also* H.R. Rep. No. 103-8 pt. 1, at 32-33 (describing the leave policies of eight States, all of which differed from each other); S. Rep. No. 103-3, at 20-21 (same); H.R. Rep. No. 103-8, pt. 1, at 66-67, 78 (Minority Views) (cataloging the "[m]ajor differences" among state laws and regulations). In fact, as the FMLA's opponents pointed out, the only semblance of uniformity among those policies was that "all but a very few State laws" were more restrictive than the FMLA. *Id.* at 66. The Commission on Family and Medical Leave report cited by state *amici* confirms that point: prior to 1993, only a minority of States provided the kinds of leave or job protection required by the FMLA, and "[b]est estimates suggest that perhaps one-quarter

to one-third of full-time private and public sector employees had the kind of leave options provided by the FMLA."[23]

Petitioners further argue that, even if there was evidence of some unconstitutional conduct by the States, the FMLA was impermissibly disproportionate because it required States to provide leave "regardless of any particular State's historical or current conduct." Pet. Br. at 35. But, as explained above, the FMLA *is* responding to each State's historical conduct; it remedies the continuing effects of past discrimination against women workers, and there is simply no question that States throughout the nation has long acted discriminatorily. The FMLA also deters ongoing discrimination by the States. Because gender discrimination, like race discrimination, is a nationwide problem, Congress, pursuant to its § 5 power, may adopt nationwide remedies. *See Mitchell*, 400 U.S. at 134.

Finally, Congress had a reasonable basis to conclude that a damages remedy for the violation of the leave requirement was an appropriate measure to enforce the equal protection guarantee. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976). Just as it had found for other employment-related civil rights statutes, *see, e.g.*, 42 U.S.C. § 2000e *et seq.*, Congress found that a damages provision served the remedial purpose of "ensuring that employees will be recompensed for their actual losses" and the deterrent purpose of "adding to employers' incentives to comply." H.R. Rep. No. 101-28, pt. 1, at 37; *see* S. Rep. No. 101-77, at 47-48 (1989); H.R. Rep. No. 100-511, pt. 2, at 44-45; S. Rep. No. 100-447, at 46-47 (1988). Congress recognized the importance of a damages remedy against not only private employers, but state employers too. *See id.* But in recognition of the States' unique concerns as sovereign, Congress enacted, beyond the general provisions accommodating the interests of all employers, *e.g.*, 29 U.S.C. § 2613 (certification requirement);

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[23] *See* Comm'n on Fam. & Med. Leave, U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 55 (1996); *see* State *Amici* Brief at 14.

id. § 2614(b) (high-level employee exemption); *id.* § 2617(a) (damages caps), additional provisions tailored to the interests of the States, *e.g.*, *id.* § 2618 (educational agencies); *id.* § 2611(3) (citing *id.* § 203(e)(2)(C)) (state political employee exemption).

Accordingly, the legislative record establishes that the FMLA is a congruent and proportional response to pervasive historical gender discrimination by the States, and to persistent ongoing gender discrimination in State employers' grants of leave. It confirms that the FMLA appropriately builds on prior legislative efforts to remedy and deter gender discrimination by supplementing the negative prohibitions in Title VII and the PDA with a measure that alleviates the adverse impact of no-leave policies caused by the long history of gender discrimination, remedies facially discriminatory leave policies, and prevents discrimination by minimizing the potential for employment decisions based on gender stereotyping.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Petitioners,

—v.—

WILLIAM HIBBS and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WOMEN'S HISTORY SCHOLARS ALICE KESSLER-HARRIS, LINDA KERBER *ET AL.*, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are historians and scholars who have studied and written extensively on United States women's history. *See* Appendix A. Because this case raises issues concerning the history of state-sponsored sex discrimination, *Amici* have an interest in bringing the historical record to the Court's attention.

SUMMARY OF ARGUMENT

Congress enacted the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-54 ("FMLA"), to prevent and remedy various forms of sex discrimination in employment stemming from the pervasive and intractable stereotype that family care is primarily women's work and is women's primary responsibility. Congress recognized that this stereotype has long caused employers, including state employers, to make family leave available, if at all, to women and not men, to refuse to hire or promote women, to fire or demote women, and otherwise to discriminate against women in employment and against men in family care benefits.

There is substantial evidence of unconstitutional state-sponsored sex discrimination with respect to the very subjects addressed by the FMLA. First, states discriminated based on sex in the employment leave they made available to their employees. They did so by restricting the availability of leave to women either explicitly in their policies or on an *ad hoc* basis by granting discretionary leave in a discriminatory manner. States also discriminated against female employees because they had taken, or state employers expected they would take, leave. States started taking steps to halt this pervasive discrimination

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[1] The parties have consented to the filing of this *Amici Curiae* brief, as evidenced by letters of consent filed with the Clerk. *Amici* are not related in any way to any party in this case, and no person or entity other than *Amici* and their counsel has authored any part of, or made any monetary contribution to the preparation of, this brief.

only in response to congressional consideration of the FMLA. Second, from the beginning of the republic until recently, states discriminated based on sex through countless laws restricting women's employment opportunities. Not only were those state laws grounded in the sex-role stereotypes addressed by the FMLA, but they also ensured, through the coercive power of the states, that women would remain primarily family caretakers. In each of these ways, the states played a substantial role in creating the need for the FMLA.

The congressional, judicial, and statutory records are replete with evidence of each of these forms of state discrimination. All of this evidence is relevant to the Court's inquiry as to whether the FMLA is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to remedy sex discrimination. Congress acted under the backdrop of a long history of sex discrimination, a history which this Court has recognized entitles sex classifications to heightened scrutiny.

ARGUMENT

I. THE COURT SHOULD CONSIDER ALL EVIDENCE OF UNCONSTITUTIONAL STATE CONDUCT JUSTIFYING THE FMLA

In order to determine whether Congress validly exercised its Section 5 power to abrogate the states' sovereign immunity, this Court has first identified "the targeted constitutional wrong," *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 646 (1999), and then considered the existence of "evidence of widespread and unconstitutional . . . discrimination by the States," *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000), sufficient to justify remedial congressional action. The constitutional wrong targeted by the FMLA is sex discrimination, including unconstitutional discrimination by the states, that restricted women's employment opportu-

nities as well as men's opportunities to take family leave based on the impermissible assumption that women and not men are responsible for family care. The stated purposes of the FMLA include "to promote the goal of equal employment opportunity for women and men," 29 U.S.C. § 2601(b)(5), and, "consistent with the Equal Protection Clause of the Fourteenth Amendment," to "minimize[ ] the potential for employment discrimination on the basis of sex by ensuring that [family and medical] leave is available . . . on a gender-neutral basis." *Id.* § 2601(b)(4). In enacting the FMLA, therefore, Congress was responding to the fact that employers, including states, discriminated based on sex by failing to make employment leave available on a gender-neutral basis. Congress was also aware of the long history of discriminatory state laws and practices that relegated women to the role of family caretakers and secondary workforce participants.

The Court should consider the full range of the overwhelming evidence of unconstitutional state action that supports remedial congressional action in the FMLA. This evidence is in the congressional, judicial, and statutory records and shows that states discriminated both in granting employment leave and in restricting women's workplace participation. While the Court has examined legislative records as "[o]ne means" of determining whether Section 5 legislation addresses unconstitutional state action, *Kimel*, 528 U.S. at 88, it has also recognized that "lack of support [in the legislative history] is not determinative of the § 5 inquiry," *id.* at 91; *Florida Prepaid*, 527 U.S. at 646 (same). Rather, as Justices Kennedy and O'Connor have observed, the existence of unconstitutional state action may also be found in "confirming judicial documentation." *Board of Trustees v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring). What is important is the wrong Congress sought to remedy, not the extent to which Congress documented the wrong.

When Congress acts to remedy discrimination based on a classification subject to heightened scrutiny under the Equal Protection Clause, it has greater leeway in making findings because the Court's heightened scrutiny doctrine already reflects judicial recognition that there has been "a history of purposeful unequal treatment" based on sex. *Kimel*, 528 U.S. at 83. That history is also confirmed in the statute books. *See Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) ("our statute books gradually became laden with gross, stereotyped distinctions between the sexes"). Indeed, the judicial and statutory records, in addition to the congressional record, reflect a history of state-sponsored sex discrimination causing and contributing to the very injury Congress addressed in the FMLA. The same history of state-sponsored sex discrimination that leads the Court skeptically to scrutinize sex-based classifications supports Congress's efforts to enact remedial legislation. Congress and this Court are entitled to rely on that history. As the Ninth Circuit aptly said, "when our nation's judicial history already documents unconstitutional discrimination against the class at issue, there is no need for Congress, separately and redundantly, to provide detailed findings of such discrimination in order to exercise its Fourteenth Amendment powers." *Hibbs v. Department of Human Res.*, 273 F.3d 844, 861 (9th Cir. 2001). Accordingly, the judicial and state statutory histories should be considered along with the legislative history in any review of the FMLA.

II. BEFORE THE FMLA, STATES UNCONSTITUTIONALLY DISCRIMINATED IN FAMILY LEAVE FOR STATE EMPLOYEES

The states historically discriminated in the family leave afforded to their own employees in a number of respects: (1) through family leave policies that restricted leave to women only, (2) through discretionary leave policies applied in a discriminatory manner resulting in leave

being available to female employees but denied to male employees, and (3) through the complete absence of leave policies that led to disparate treatment of female employees. These state responses to employees' family care responsibilities reinforced a social order whereby women are the primary family caregivers and men the breadwinners.

Congress recognized that when family leave is available to women and not men, or when it is not available at all, employers discriminate against women in hiring and promotions on the assumption that they are less committed to their jobs than men. *See, e.g.*, H.R. Rep. No. 103-8(I), at 29 (1993) ("A law providing special protection to women . . . , in addition to being inequitable, runs the risk of causing discriminatory treatment.").[2] Such policies also affect family choices by providing incentives for women and not men to undertake family care responsibilities. *See, e.g.*, H.R. Rep. No. 103-8(II), at 14 (1993) ("While women have historically assumed primary responsibility for family caretaking, a policy that affords women employment leave to provide family care while denying such leave to men perpetuates gender-based employment discrimination and stereotyping and improperly impedes the ability of men to share greater responsibilities in providing immediate physical and emotional

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[2] *See also Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor & Human Res., Part 2*, 100th Cong. 170 (1987) ("*1987 Hearings*") (testimony of Peggy Montes) ("Job opportunities for [women with families] are limited, and they often miss pay increases and promotions. The lack of uniform parental and medical leave policies in the work place has created an environment where discrimination is rampant."); 138 Cong. Rec. H8,226-27 (1992) (remarks of Rep. Hayes) ("Too often women experience the nightmare of going in to their employer with the news that they are pregnant. Although they are valued employees, up to the moment they become pregnant, suddenly they find themselves unwanted.").

care for their families.").[3] Discriminatory family leave policies thus result in state-sanctioned relegation of women to the status of secondary employees. It is these forms of unconstitutional state-sponsored sex discrimination in family leave policies that Congress targeted in the FMLA.

A. State Policies Explicitly Accorded Different Leave To Women And Men

During the eight years between the introduction of the first federal family leave bill in 1985 (the Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985)) and the passage of the FMLA, Congress amassed substantial evidence of sex discrimination as a result of state employment policies that accorded family leave differently to women and men.

The congressional record references studies of public sector family leave policies conducted by the Yale Bush Center, which surveyed all 50 states in the mid-1980s. *See, e.g., 1986 Hearings* at 29-30 (testimony of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project); *The Parental Leave Crisis: Toward a National Policy* (Edward F. Zigler & Meryl Frank eds.,

[3] *See also Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Rel. and the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 99th Cong. 101 n.2 (1986) ("*1986 Hearings*") (statement of Women's Legal Defense Fund) ("[B]ecause of sex discrimination against men, some working fathers may find it more difficult than their female counterparts to be permitted to accommodate family responsibilities without suffering adverse employment consequences."); *Family Medical Leave Act of 1987: Joint Hearing Before the Subcomm. on Labor-Mgmt. Rel. and the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 100th Cong., 1st Sess. 235 (1987) (testimony of Donna Lenhoff) (employment policies "continue to operate as if women's role is to stay at home and care for the family and men's role is to work outside the home").

1988) (compilation of Yale Bush Center survey results). The Yale Bush Center survey found that before passage of the FMLA, parental leave policies in the states, where they existed, overwhelmingly restricted the availability of leave to female employees. *See* Kathleen Makuen, "Public Servants, Private Parents: Parental Leave Policies in the Public Sector," in *The Parental Leave Crisis* 202-03. According to this 1985 state survey, 30 states reported offering some form of infant care leave to state employees, but nearly two-thirds of these states (19), including Nevada, reported restricting such leave to female employees. *Id.* The study thus documents discrimination on the basis of sex in state leave policies.

Seven of the states that restricted parental leave to female employees also refused to provide job protection during some or all of the leave period. *Id.* By refusing to guarantee female leave-takers a job upon return, these states further undermined women's position in the workplace. Lack of job protection for women after maternity leave was one form of sex discrimination targeted by the FMLA.

In addition to evidence of discriminatory leave policies in the public sector, the legislative history incorporates several private sector studies that document extensive sex discrimination in employer leave policies. *See, e.g., 1986 Hearings* at 151-228 (reproducing Catalyst, *Report on a National Study of Parental Leaves* (1986);[4] S. Rep. No. 103-3, at 14-15 (1993) (1989 Bureau of Labor Statistics survey found that 37% of large employers offered maternity leave while only 18% offered paternity leave); 138 Cong. Rec. S12,096 (1992) (1990 Bureau of Labor Statistics study found same). While Congress did not rely

[4] The Catalyst Report was cited favorably throughout the legislative record. *See, e.g., 1986 Hearings* at 101 n.2; H.R. Rep. No. 100-511(II) at 24 (1988); H.R. Rep. No. 103-8(I), at 28.

exclusively on private sector evidence, it was aware that private sector leave policies reflect the same problems as those in the public sector, as the legislative record reflects. *See, e.g., 1986 Hearings* at 30 (statement of Meryl Frank, Yale Bush Center) ("public sector leaves don't vary much from private sector leaves"); *id.* at 147 (statement of Washington Council of Lawyers) (referencing discriminatory treatment in both public and private sector leave policies).

The Ninth Circuit correctly determined, after reviewing evidence of sex discrimination in public and private policies and evidence that these policies are substantially similar—all recorded in the legislative history—that "[t]aken together [these studies] constitute substantial evidence of unconstitutional state-sponsored gender discrimination in leave policies for state employees." *Hibbs*, 273 F.3d at 859.

Equally important, state laws themselves—which Congress examined in the legislative record, *see, e.g.*, H.R. Rep. No. 103-8(I), at 32-33, 74-84—confirm that states discriminated based on sex in their family leave laws by explicitly restricting leave to women or by defining family leave in relation to pregnancy and related disabilities so as effectively to restrict leave to women.[5] As of 1993, nine states and Puerto Rico offered "family leave" to female employees only, restricting such leave to pregnancy, disabilities related to pregnancy, and maternity leave. *See* Women's Bureau, U.S. Dep't of Labor, *State Maternity/Family Leave Law* (1993). These statutes were

[5] Ohio required employers to provide leave for "childbearing" for "a reasonable amount of time." Ohio Admin. Code § 4112-5-02(G)(6) (1989). Iowa provided leave for "pregnancy, childbirth, or related medical conditions" for women only. Iowa Code § 216:6:2 (1993). Montana made it unlawful for an employer to "refuse to grant the employee a reasonable leave of absence for . . . pregnancy." Mont. Code Ann. § 49-2-310, 311 (1987).

narrowly drafted so that only female employees would be eligible for leave. For instance, the Massachusetts statute was captioned "Entitlement of female employees; rights and benefits," and provided for reinstatement of a "female employee" absent for up to eight weeks of "maternity leave." Mass. Gen. Laws ch. 149, § 105D (1993).[6] The analogous Tennessee law was simply entitled "Maternity leave" and provided for leave "for a period not to exceed four (4) months for pregnancy, childbirth, and nursing the infant, where applicable (such period to be hereinafter referred to as 'maternity leave')." Tenn. Code. Ann. § 4-21-408 (1993). As originally passed, the Tennessee statute provided female employees with leave "for the purpose of bonding" with a new child, but did not permit fathers leave to "bond." *See* Wendy S. Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed*, 77 Cal. L. Rev. 171, 176-77 (1989). After the act's passage, the Tennessee attorney general's office issued an opinion suggesting that it might violate the equal protection clause. Rather than expand the statute to include fathers, the Tennessee legislature simply manufactured a different purpose—"for pregnancy, childbirth, and nursing the infant, where applicable"—to achieve the same result. *Id.*

In addition to statewide laws, discriminatory leave policies were also implemented by individual state agencies. For instance, prior to the FMLA, a number of state universities had discriminatory policies that provided infant care leave to female employees only or otherwise unlawfully

[6] *See also The Family Medical Leave Act of 1991: Hearings on S. 5 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor & Human Res.*, 102d Cong., 1st Sess. 34 (1991) (remarks of Dr. T. Berry Brazelton) (recounting how Massachusetts parental leave bill was modified and limited to maternal leave only); *id.* (remarks of Sen. Dodd) (responding by referencing evolving notions of fathers' role in family care).

differentiated between men and women.[7] State employers' collective bargaining agreements similarly restricted parenting leave to women only. *See Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. On Labor & Human Res.*, 100th Cong., 1st Sess., 385 (1987) (testimony of Gerald McEntee).

State family leave policies that provide leave only to women amount to "widespread *intentional* gender discrimination by the states." *Hibbs*, 273 F.3d at 859.[8] Such state laws rely on and reinforce the gender-role stereotypes of women as caregivers and men as breadwinners. This Court has found that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr v. Orr*, 440 U.S. 268, 283 (1979). The FMLA is intended to ensure that there is no discrimination based on assumptions of the "proper place" of men and women.

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[7] From 1971-88, the University of Colorado provided up to two semesters of maternity leave unrelated to pregnancy disability to female faculty members only. Indiana State University, the University of Maryland, and the University of New Orleans also permitted only female employees to take infant care leave unrelated to pregnancy disability. The University of Minnesota's parental leave policy in the early 1990s provided six weeks leave to both women and men, but paid women for all six weeks and men for only four. *See* State university policies (on file with Amer. Ass'n of Univ. Professors).

[8] Local provisions have likewise been struck down. *See, e.g., Schafer v. Board of Pub. Educ.*, 903 F.2d 243, 248 (3d Cir. 1990) (provision granting childrearing leave unrelated to physical disability to mothers but not fathers violates Title VII); *Chavkin v. Santaella*, 81 A.D.2d 153, 157-58 (N.Y. App. Div. 1981) (city department permitted only female employees to use sick leave to extend infant care leave regardless of physical disability).

B. States Applied Discretionary Leave Policies Differently For Women And Men

Before passage of the FMLA and state laws based thereon, state leave policies were more often than not discretionary and applied in a discriminatory manner based on traditional gender-role stereotypes even in instances where the laws themselves were facially neutral. Of the 30 states in the Yale Bush Center survey that reported offering parental leave, "[i]n nearly all cases, extended leave was granted at the discretion of the supervisor." Makuen at 200. Congress recognized, and studies confirm, that where parental leave is granted at the discretion of the employer, whether in the public or private sector, male employees are less likely to be granted leave than their female counterparts. *See, e.g.*, H.R. Rep. No. 103-8(II), at 11 (citing study of federal civil service finding that supervisory discretion to grant leave results in "differences between how men and women are treated"). This finding was consistently reported to Congress in family leave act hearings. *See, e.g., 1986 Hearings* at 147 (statement of Washington Council of Lawyers) ("Parental leave for fathers . . . is rare . . . . Where child-care leave policies do exist, men, both in the public and private sectors, receive notoriously discriminatory treatment in their requests for such leave.").[9]

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[9] *See also 1987 Hearings* at 536 (statement of Professor Susan Deller Ross) ("[T]here are a number of studies . . . in which it's shown that employers in this country that are giving family leaves to their workers are not giving it non-discriminatorily, they are, by and large, giving it only to women, not to men. It's fairly flagrant discrimination."); Martin H. Malin, *Fathers and Parental Leave*, 72 Tex. L. Rev. 1047, 1078 (1994) ("Catalyst found that sixty-three percent of large employers considered it unreasonable for a man to take any parental leave, and another seventeen percent considered parental leave reasonable only if limited to two weeks or less. Even among large employers providing parental leave, an amazing forty-one percent considered it unreasonable for a man to actually use it.");

Case law confirms that state employers applied discretionary leave policies in a discriminatory fashion. In *Knussman v. State of Maryland*, 272 F.3d 625 (4th Cir. 2001), for instance, a Maryland state police officer and new father challenged the application of a facially neutral state statute that "permitted 'primary care givers' to 'use, without certification of illness or disability, up to 30 days of accrued sick leave to care for [a] child . . . immediately following . . . the birth of the employee's child.' " *Id.* at 628 (quoting Md. Code Ann., State Pers. & Pens. § 7-508(a)(1) (1994)). Plaintiff's request for "primary care giver" status was denied by a state supervisor who informed plaintiff that his wife would have to be "in a coma or dead" for him to qualify as the primary care giver under the statute. *Id.* at 629-30 (internal quotations omitted). The Fourth Circuit held that the state actor "applied a facially neutral statute unequally solely on the basis of a gender stereotype in violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 634-35. The state actor's decision, the court found, "was a by-product of traditional ideas about a woman's role in rearing a child." *Id.* at 639.

In addition to restricting family leave to women, state employers acting in a discretionary fashion have applied sex role stereotypes to deny women employment opportunities. For instance, one state employer refused to consider a female employee for a promotion because of the employer's belief that the employee should stay at home to care for her family. *Moore v. Alabama State Univ.*, 980 F. Supp. 426 (M.D. Ala. 1997). The district court concluded that the state official had unlawfully discriminated, based on evidence that he told the plaintiff "that he could not promote her because she was pregnant" and "that she could not be considered for the promotion because she was a married mother." *Id.* at 434. When leave is discretionary and therefore *de facto* limited to women, employers, including states, are also likely to discriminate against women because they have taken or are likely to take leave. *See Arkin v. Oregon*, No. 6:96CV6327 (D. Or., filed Dec. 19, 1996) (female allegedly denied tenure at state university because she had taken maternity leave); *Garrett*, 193 F.3d at 1229 (Cook, J., dissenting in part) ("Congress also found that women experienced discrimination . . . in that employers' perceptions that women served as caretakers and therefore were more likely to ask for leave time contributed to a decreased willingness to hire women in the first instance or promote them.").

Garrett v. Board of Trustees, 193 F.3d 1214, 1229 (11th Cir. 1999) (Cook, J., dissenting in part) ("Congress found that, due to societal perceptions regarding family roles, employers who offered leave time to women discriminated against men with regard to that employment benefit, either by not offering it, granting a shorter amount than was made available to women, or discouraging men from taking it."), *rev'd on other grounds*, 531 U.S. 356 (2001).

The FMLA places the decision as to whether to take family leave in the hands of the employee, and takes discretionary decisionmaking out of the hands of the state (or private) employer, thereby eliminating the risk of discriminatory treatment based on sex.

C. States Provided No Family Leave

1. States Had Not Enacted Family Leave Policies Before Introduction of the FMLA

Petitioner argues that the FMLA cannot be justified as a remedy for unconstitutional sex discrimination because at the time the FMLA was passed, most states provided employees with a remedy in the form of state family leave laws. Pet. Br. at 4, 24, 32. Petitioner's argument is belied by the facts and by the FMLA's legislative history. *See, e.g.*, H.R. Rep. No. 103-8(I), at 78 ("The debate on family and medical leave suggests that many States have already passed such leave benefits as are contained in H.R. 2. Yet that is not the case."). When family leave leg-

islation was initially proposed in Congress in 1985, not a single state had a family leave law on its books enabling employees to care for sick family members. That is the environment in which Congress first considered the FMLA. Congress heard testimony that the absence of leave policies leads to sex discrimination in employment. *See, e.g., 1987 Hearings* at 172 ("lack of uniform parental and medical leave policies in the work place has created an environment where discrimination is rampant").[10] Numerous commentators agree.[11]

Far from being leaders in the area of family leave legislation as the revisionist history of Petitioner and *Amici* Alabama *et al.* suggests, every state that has passed a family leave law has done so with awareness of and in response to federal legislative activity. This fact is confirmed by the timing and substance of state leave laws, as well as by the congressional record. *Amici* Alabama *et al.* concede that state family leave laws were "essentially modified versions of the FMLA legislation pending in

[10] Congress also recognized that failure to afford family leave negatively affects women's position in the workplace because "the primary responsibility for family caretaking often falls on women." 29 U.S.C. § 2601(a)(5) (noting that "such responsibility affects the working lives of women more than it affects the working lives of men"); S. Rep. No. 102-68, at 28 (1991) (absence of family leave has "adverse impact on women's earnings"). While the Constitution may not prohibit state conduct that has a disparate impact on women, intentional state actions in the form of unconstitutionally discriminatory laws perpetuated women's roles as family caretakers. *See* Part III, *infra*.

[11] *See, e.g.*, Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Reform 372 (2001); Donna R. Lenhoff & Sylvia M. Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 Harv. J. on Legis. 403, 405-06 (1989); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118, 1132 (1986).

Congress" or "targeted one or another of the leave issues addressed in the FMLA." Br. of *Amici* Alabama *et al.* at 11. In the FMLA's legislative history, Congress likewise noted that federal legislative efforts were the catalyst for state proposals, observing that "[s]ince Federal family leave legislation was first introduced, numerous States *have begun to consider* similar family leave initiatives." *See* S. Rep. No. 103-3, at 20-21 (emphasis added).[12]

The introduction of the Parental and Disability Leave Act of 1985, *supra*, and a similar bill in 1986, H.R. 4300, 100th Cong. (1986), preceded the initiation of legislative activity in the states. In fact, not a single state had passed a bill providing for leave to care for ill family members before 1987, after federal leave legislation had twice been introduced. *See, e.g.*, Steven K. Wisensale & Michael D. Allison, *An Analysis of 1987 State Family Leave Legislation: Implications for Caregivers of the Elderly*, 28 The Gerontologist 779, 780 (Dec. 1988); Ira B. Sprotzer, *Parental and Family Leave Laws: A Review and Analysis*, *in* 15-4 Employee Benefits J. 12 (Dec. 1990); *Family Leave Activity Shifts to the States*, 11-10 Employee Benefit Notes 1-3 (Oct. 1990); *see generally* Appendix B (summary of pre-FMLA state family leave laws). By 1987, only a handful of states enacted leave laws, and these laws were limited in scope compared to the FMLA. Only Connecticut had a statute permitting leave to care

[12] *See also* H.R. Rep. No. 103-8(I), at 32-33; *1987 Hearings at* 390 ("[I]t is important for the federal government again to take the lead on . . . family leave [because] States tend to follow the lead . . . of the federal government, and if this example is held up by the federal government and standards are set, then I really think Kentucky, as other states, will fall in line and adopt parental leave policies.") (remarks of Debra Spotts Merchant); *id.* at 339 ("[O]ne of the things that I have seen historically take place is that when a statute or when a law emanates from the federal level that states generally follow suit, . . . once it is initiated at the federal level it will trickle down.") (remarks of Martin Luther King, III).

for ill family members other than children, *id.*, making it the only state with a statute covering the leave available under FMLA § 2612(a)(1)(C).

At the time the FMLA was passed in 1993, 22 states, including Nevada, had not enacted any form of parental or family leave legislation. *See* Appendix B; State Maternity/Family Leave Law; H.R. Rep. No. 103-8(I), at 32-33. In states that had passed some form of family leave law by 1993, the scope of the laws varied widely, and many fell short of the protections provided by the FMLA. Seven states, in their family leave and maternity disability laws, granted leave to *female employees only*, either explicitly or effectively, for birth and adoption. Nearly half of these laws failed to extend leave to care for sick family members, as provided in FMLA § 2612(a)(1)(C). Eleven of these laws covered only leave for births or adoptions. At the time Congress passed the FMLA, then, only one-third of the states had enacted non-discriminatory family leave laws approaching the scope of the FMLA.

2. State Sick Leave Policies Did Not Provide FMLA-Equivalent Family Leave

Contrary to the argument advanced by *Amici* Alabama *et al.*, states that permitted employees to use sick leave to care for ill family members still could not be said to have had "family leave" policies in place prior to the introduction of the FMLA. Sick leave policies were not designed to, nor did they, offer the range of benefits provided for in the FMLA. These policies fell short of the FMLA in several respects.

First, the availability of sick leave was almost always at the discretion of the supervisor. In some instances, supervisory discretion was written into the policy. For instance, the use of sick leave was permitted in Georgia and Nevada only with a supervisor's approval. *See* Michele Lord & Margaret King, *The State Reference Guide to Work-Family Programs for State Employees* 107, 115 (1991). In other cases, supervisory discretion resulted from the intentionally vague language of the operative provision. *Id.* at 33 ("By leaving the language vague, the actual interpretations and decision-making responsibility for allowing the use of sick leave in family situations lies with [supervisors]. Supervisors' sensitivity to the needs of employees will ultimately determine the use and helpfulness of these sick leave coverage policies."). One of the primary purposes of the FMLA is to avoid such discretionary decision-making concerning family leave, which often results in discriminatory treatment based on sex.

Even after the introduction of the FMLA, a number of states did not permit their employees to use sick leave to care for ill family members. As of 1990, seven states restricted the use of sick leave to employee illness only, *id.* at 31-32, and none of these states had enacted family leave laws between 1987 and 1990. As a result, as of 1990, employees of these seven states did not have any type of leave available to tend to ill family members.

Among those states that permitted employees to use sick leave to care for ill family members, the scope of coverage varied widely based on the definition of family member. *Id.* at 32. As of 1990, the majority of such states (25) limited the use of sick leave to care for "dependents," defined as children or by the state's tax code. *Id.* One state permitted the use of sick leave only to care for the employee's "household members" or those for whom the employee had "custodial responsibility." *Id.* at 32, 104-25. Another four states restricted the use of sick leave to care for "immediate family members." *Id.* Nine states simply used the term "family member" to define the scope of coverage, thereby requiring supervisors and others to interpret the precise scope. *Id.* As of 1990, then, employees of fewer than half the states could use their sick leave to care for ill family members other than children, and in

many cases access to leave depended on a supervisor's interpretation of state policy.

Almost half of the states explicitly imposed short time restrictions on the use of sick leave to care for ill family members. *Id.* (from 2 to 24 days, but most under 5 days). Some states limited the number of sick days or hours per year an employee could use to tend to ill family members. For instance, state employees were eligible to take only 4 days per year in Arizona and Pennsylvania, and 40 hours per year in Iowa, North Dakota, and West Virginia. *Id.* at 105, 117, 119, 123. Other states limited the number of sick days on a per occurrence basis, such as California and Washington, where employees could take only 5 days per illness. *Id.* at 105, 119. The FMLA, on the other hand, makes available up to twelve weeks of leave in the event of a serious illness in the family.

III. A LONG HISTORY OF UNCONSTITUTIONAL STATE-SPONSORED SEX DISCRIMINATION ENFORCED SEX ROLE STEREOTYPES

In addition to discriminatory leave policies, various forms of unconstitutional state laws—including mandatory maternity leave laws, protective wage and hour laws, discriminatory death and incapacity benefit laws, unemployment insurance laws, and jury eligibility laws—have reinforced sex role divisions and have thus created the need for the FMLA. These forms of blatant state-sponsored sex discrimination have been overturned by court after court, but the limitations they created and perpetuated have had lasting effects, confining women to the role of family caretakers and hindering men from sharing family care responsibilities. Discriminatory state laws accomplished this result not only by reinforcing stereotypes but also by excluding women outright from certain forms of employment; requiring certain women to play the role of family caretakers; making it more expensive or difficult

for employers to hire women than men; and creating incentives for women to undertake, and for men to abstain from, family caretaking. These state laws *required* state, local government, and private entities to discriminate based on sex and have had a lasting impact on economic realities and on attitudes about who should be at home and at the workplace—both of which are redressed by the FMLA.

This Court has long condemned discriminatory state laws as unconstitutional and acknowledged that they perpetuate gender role stereotypes. *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982); *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *Frontiero*, 411 U.S. at 684. Just as limiting admissions to state-supported nursing schools based on the "old view that women, not men, should become nurses" makes that assumption "a self-fulfilling prophecy," *Hogan*, 458 U.S. at 730, so do state laws based on the old assumption that women should be caretakers perpetuate that reality. By enabling both men and women to balance work and family care, the FMLA remedies some of the damage created by these discriminatory state laws which "serve[d] to ratify and perpetuate invidious, archaic, and overbroad stereotypes," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994), about the roles of women and men.

A. States Excluded Women From Jobs, Assuming that Women Should Be Family Caretakers

Throughout the 19th and 20th centuries, states used a variety of discriminatory laws to limit the professions in which women could work. States prohibited women's employment in law, mining, jobs involving moving machinery, establishments serving alcohol,[13] and other

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[13] *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464 (1948) (Michigan law); *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971).

jobs.[14] *See generally* 3 Lex K. Larson, Employment Discrimination § 44.01 (2d ed. 2002); Edith L. Fisch & Mortimer D. Schwartz, *State Laws on the Employment of Women* 21-22 (1953). States kept a number of these prohibitions in effect until recently. For instance, as of 1970, ten states still forbade women from working in establishments serving alcohol; Alaska, Ohio and Pennsylvania retained these prohibitions as late as 1980. 3 Larson § 44.01 n.24. Also as of 1970, fourteen states still prohibited women from working in mines. Those laws remained enforceable in four states as of 1980, *id.* § 44.01 n.29, and Arkansas' law is still on the books. Ark. Code Ann. § 11-7-318 (Michie 2001).

While state laws barring women from certain occupations persisted until recently, they were based on centuries-old stereotypes about the role of women, including the assumption that women should be in the home caring for their families rather than at work. *See, e.g., Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring) (upholding Illinois law excluding women from practice of law because "the domestic sphere" is "that which properly belongs to the domain and functions of womanhood"); *In re Goodell*, 39 Wis. 232 (1875) (justifying women's exclusion from practice of law because "[t]he law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world"). The states' conviction that women's place was in the home was so entrenched that in the 1930s, Massachusetts even attempted to pass a law to exclude or remove all married women from public service. *In re Opinion of the Justices*, 22 N.E.2d 49 (Mass. 1939) (finding proposed bills unconstitutional, though not because they discriminated on the basis of sex). Thus, female state employees were not immune from the stereotypes that limited women's employment generally.[15]

[14] *See, e.g., Ridinger v. Gen'l Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971) (Ohio law prohibiting women from working as section hands, crossing watchmen, express drivers, and metal moulders), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972).

State laws excluding women from certain occupations obviously limit women's employment opportunities and are plainly unconstitutional. This Court has long recognized that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975). But the attitudes fostered by these discriminatory state laws continue to affect behavior; indeed, these attitudes also underlay state discrimination in family leave.

B. States Enacted Discriminatory Protective Laws Limiting Women's Employment Opportunities and Confining Them to the Role of Caretakers

Until less than thirty years ago, state laws further limited women's employment opportunities by imposing a variety of restrictions on the employment of women but not men. States regulated the hours and times women could work, imposing maximum hour and overtime restrictions not applicable to men;[16] the wages women could earn, imposing minimum wage requirements not

[15] States also unconstitutionally restricted women's employment prospects by excluding them from institutions of higher learning. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993); *Kirstein v. Rector & Visitors of Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970).

[16] *See, e.g., Radice v. New York*, 264 U.S. 292 (1924); *Miller v. Wilson*, 236 U.S. 373 (1915); *Riley v. Commonwealth of Mass.*, 232 U.S. 671 (1914); *Kane v. Egan*, 14 Conn. Supp. 485 (1947); *Ass'n Indus. of Okla. v. Indus. Welfare Comm'n*, 90 P.2d 899 (Okla. 1939); *State v. Ehr*, 221 N.W. 883 (N.D. 1928); *State v. Collins*, 198 N.W. 557 (S.D. 1924); *State v. Dominion Hotel*, 151 P. 958 (Ariz. 1915), *aff'd*, 249 U.S. 265 (1919); *State v. Charles Schweinler Press*, 108

applicable to men;[17] the weights women could lift, imposing limits not applicable to men;[18] and mandated days of rest, meal and rest periods, and seating facilities not required for men. *See generally* 3 Larson § 44.01.

These discriminatory state laws were extremely common and remained in effect well into the 1970s. The law reporters teem with 1970s cases invalidating protective laws for women under Title VII.[19] In 1975, four states and Puerto Rico still prohibited or regulated night work by women; eight states still mandated meal periods for women; and five states still mandated rest periods for women. *See* Women's Bureau, U.S. Dep't of Labor, Bulletin 297, *1975 Handbook On Women Workers*, at 338-39 (1975) (hereinafter "*1975 Handbook*"). At that time, fif-

N.E. 639 (N.Y. 1915); *Stettler v. O'Hara*, 139 P. 743 (Ore. 1914), *aff'd*, 243 U.S. 629 (1917); *W. C. Ritchie & Co. v. Wayman*, 91 N.E. 695 (Ill. 1910).

[17] *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *New Jersey Rest. Ass'n v. Holderman*, 131 A.2d 773 (N.J. 1957); *Vissering Mercantile Co. v. Annunzio*, 115 N.E.2d 306 (Ill. 1953); *Young v. Willis*, 203 S.W.2d 5 (Ky. 1947); *Strain v. Southerton*, 62 N.E.2d 633 (Ohio App. 1945); *McGrew v. Indus. Comm'n*, 85 P.2d 608 (Utah 1938); *Larsen v. Rice*, 171 P. 1037 (Wash. 1918); *see generally Topeka Laundry Co. v. Court of Indus. Relns.*, 237 P. 1041, 1046 (Kan. 1925) (listing statutes).

[18] *See, e.g., Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Manning v. Gen'l Motors Corp.*, 1971 U.S. Dist. LEXIS 12108 (N.D. Ohio 1971) (collecting cases), *aff'd*, 466 F.2d 812 (6th Cir. 1972).

[19] *See, e.g., Stryker v. Register Publ'g Co.*, 423 F. Supp. 476 (D. Conn. 1976); *Homemakers, Inc. v. Div. of Indus. Welfare*, 509 F.2d 20 (9th Cir. 1974); *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972); *Garneau v. Raytheon Co.*, 323 F. Supp. 391 (D. Mass. 1971); *Kober v. Westinghouse Elec. Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd*, 480 F.2d 240 (3d Cir. 1973); *Local 246 v. Southern Cal. Edison Co.*, 320 F. Supp. 1262 (C.D. Cal. 1970).

teen states still had maximum hours laws for women. *Id.* New Hampshire's night work law was not repealed until 1989, and Pennsylvania's until 1988. 3 Larson § 44.01 n.11. In 1964, 40 states regulated women's hours in one or more industries. *1975 Handbook* at 329. Similarly, as of 1970, 41 states still limited work for women in one or more industries; 45 states still required "appropriate seating" for women in certain jobs; and ten states and Puerto Rico still imposed weight-lifting restrictions applicable only to women. 3 Larson § 44.01. In 1953, 23 states had women-only minimum wage laws in effect. Fisch & Schwartz 24. Those laws were still enforced in Colorado, Utah and Wisconsin in 1975. *1975 Handbook* at 316.

These state protective laws were based in large part on the old stereotype that women's participation in the workforce was secondary to their role as family caretakers. For example, in upholding a women's hours law, the Supreme Court of California said that women had "household or other domestic duties" that would occupy their time. *Ex Parte Miller*, 124 P. 427, 429 (Cal. 1912), *aff'd*, 236 U.S. 373 (1915). As the Court explained almost a century ago, there was "a widespread belief" that protective legislation was justified based in large part on women's "maternal functions," "the rearing and education of the children," and "the maintenance of the home." *Muller v. Oregon*, 208 U.S. 412, 419-20 (1908). Countless state courts relied on similar discriminatory reasoning to uphold laws imposing restrictions on women's employment.[20]

[20] *See, e.g., State v. Ehr*, 221 N.W. 883, 884 (N.D. 1928); *State v. Charles Schweinler Press*, 108 N.E. 639, 640 (N.Y. 1915); *State v. Elerding*, 98 N.E. 982, 984 (Ill. 1912); *W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695, 697 (Ill. 1910); *State v. Williams*, 51 Misc. 383, 389 (N.Y. City Ct.), *aff'd*, 116 A.D. 379 (N.Y. Sup. Ct. 1906), *aff'd*, 81 N.E. 778 (N.Y. 1907); *Wenham v. State*, 91 N.W. 421 (Neb. 1902) (upholding women's hours law to ensure women's ability to "bear[ ] their share of the burdens of the family and the home"); *State v. Buchanan*, 70 P. 52, 54 (Wash. 1902); *see generally* Judith A. Baer,

These discriminatory state laws made the sex role stereotypes on which they were based self-enforcing. This Court has recognized, for example, that "prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work." *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). Similarly, maximum hour laws may cause "an employer [to] refuse to hire a potential employee, solely because of her sex, if, for example, he requires his employees to work longer hours or periods than are specified in" the law. *Jones Metal Prods. Co. v. Walker*, 281 N.E.2d 1, 6 (Ohio 1972). These laws limited women's employment opportunities and caused employers to view them as less desirable employees.[21] As courts have recognized, protective laws also had an adverse effect on women's wages[22] and prevented women from receiving promotions.[23] "By denying that women were

The Chains of Protection: The Judicial Response to Women's Labor Legislation 23-29 (1978).

21 *See, e.g., Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) (employer refused to hire woman based on California women's hours and weight lifting laws); *State v. Fairfield Cmtys. Land Co.*, 538 S.W.2d 698 (Ark. 1976) (because of limitations on the overtime women were allowed to work in Arkansas, "[i]t is fair to assume that an employer might therefore decide to hire a man rather than a woman, both being qualified"); 3 Larson § 44.01 n.34 (citing 1967 survey of 78 companies that "showed that state protective legislation was the reason in 18 percent of the instances in which females were rejected for employment").

22 *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 191-94 (1974) (situation in which state laws restricting women's night work had continuing effect on women's wages after repealed).

23 *See, e.g., Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304, 1306 (S.D. Ill. 1970) ("[f]emale employees . . . [we]re not receiving their share of overtime hours and [we]re not receiving assignments or promotions to jobs normally requiring the performance

full-fledged, equal wage earners, [protective] legislation institutionalized social reproduction as women's primary role." Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* 212 (1982). Conversely, these laws also cemented men's role in the workplace rather than the home, by, for example, "impos[ing] primarily upon the male employees the burdens of [certain forms of] work." *Caterpillar Tractor*, 317 F. Supp. at 1306. These laws thus made it more difficult for men to share the burdens of family care. In short, for over two centuries, states enacted and enforced laws that are plainly unconstitutional under current standards and perpetuated the stereotype that women are primarily family caretakers and men primarily breadwinners.

C. States Enacted Other Discriminatory Laws That Reinforced Gender-Role Stereotypes and Encouraged Women to Remain Family Caretakers

1. Benefits for Male Workers Only

Until the 1980s, state laws continued to discriminate against women workers on the assumption that their employment was secondary. For example, state laws providing that widows, but not widowers, would automatically receive workers' compensation or other benefits at the death of a spouse unconstitutionally presumed that women were dependent on their husbands' incomes. Most of these statutes were not struck down until the 1980s,[24] even though for several decades prior, "more often than

of work for overtime hours in excess of those permitted by" Illinois law); *see also* 3 Larson § 44.01 (state protective laws "tended to ban women from a disproportionate number of these more lucrative jobs").

24 *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (Missouri law); *Portman v. Steveco, Inc.*, 453 N.E.2d 284 (Ind. Ct. App. 1983); *Swafford v. Tyson Foods, Inc.*, 621 S.W.2d 862 (Ark. App. 1981); *Hess v. Wims*, 613 S.W.2d 85 (Ark. 1981).

not a family's standard of living depend[ed] upon the financial contributions of both marital partners." *Arp v. Workers' Comp. Appeals Bd.*, 19 Cal. 3d 395, 405 (Cal. 1977) (internal citations omitted).

Based on archaic assumptions of "female economic disablement," *Tomarchio v. Greenwich Township*, 379 A.2d 848, 853 (N.J. 1977), these laws were justified on the grounds that it was more efficient to presume dependency in the case of women but not men.[25] As a result, female employees received fewer benefits than males, making it more economically rational for men to become the primary breadwinners in the family.[26] This Court has recognized that "this kind of discrimination against working women" is unconstitutional and perpetuates the stereotype that men are the primary breadwinners in the family. *Wengler*, 446 U.S. at 148; *see also Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

2. Presumption in Unemployment Insurance Law that Women are Caretakers

Until recently, states enacted and enforced unemployment compensation laws that discriminated against women by automatically presuming that pregnant women or women who had recently given birth could not work.[27] Notably,

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[25] *See, e.g., Arp*, 19 Cal. 3d at 404 (noting that "widow's conclusive presumption of total dependency has survived essentially unchanged since the enactment of the first detailed set of workers' compensation statutes").

[26] In other words, state laws also hindered men from becoming family caretakers. Another way in which state laws accomplished this is through presumptions that unwed fathers are unfit to raise their children. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972) (Illinois law).

[27] *See, e.g., Turner v. Dep't of Empl. Sec.*, 423 U.S. 44 (1975) (per curiam) (Utah law making pregnant women ineligible for unemployment benefits for 12 weeks before and 6 weeks after child birth);

many of these statutes assumed that women were unable to work for a period of time after childbirth, presumably because they had to care for their children. For example, based on an assumption that women were unable or unwilling to work for an indefinite period after childbirth, a Colorado statute made women ineligible for unemployment insurance after the conclusion of their pregnancies unless, after giving birth, they spent thirteen weeks in full-time employment. *See Sylvara v. Indus. Comm'n*, 550 P.2d 868, 869 (Colo. 1976) (finding statute unconstitutional).

Based on those assumptions, women were routinely held ineligible for unemployment benefits when they were willing and able to work despite the fact that similarly situated men were eligible. These laws thus created economic incentives for women and not men to undertake family care responsibilities because in the event the primary breadwinner lost his or her job, only the man could receive unemployment benefits. This Court has repeatedly criticized state laws based on a preference for "an allocation of family responsibilities under which the wife plays a dependent role," *Orr*, 440 U.S. at 279 n.9, and has held unconstitutional conclusive presumptions of women's

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UAW v. Johnson, 674 F.2d 1195 (7th Cir. 1982) (Indiana statute presuming women are unable to work 13 weeks before and 4 weeks after child birth); *Gonzales v. Texas Empl. Comm'n*, 486 F. Supp. 278 (S.D. Tex. 1977) (Texas policy denying benefits to women in last trimester of pregnancy and for 6 weeks after delivery), *aff'd*, 614 F.2d 1295 (5th Cir. 1980); *Conn. Nat'l Org. for Women v. Peraro*, No. N77-477, 1980 WL 212, at *1 (D. Conn. Apr. 8, 1980) (consent decree forbidding state agencies from declaring, *inter alia*, women with young children not yet in childcare as unable to work); Utah Code Ann. § 35-4-5(h)(1) (1974) (amended 1976) (women disqualified from unemployment benefits during 18-week period before and after childbirth); *cf. Boren v. Dep't of Empl. Dev.*, 59 Cal. App. 3d 250 (1976) (law denying unemployment compensation to workers who left their job for "domestic reasons").

inability to work before and after pregnancy. *Turner*, 423 U.S. 44 (1975).

3. Mandatory Maternity Leave for Women Only

State laws also kept women out of the workplace and in the home by requiring women to take maternity leave during and after pregnancy, often without job security. As of 1953, Connecticut, Massachusetts, Missouri, New York, and Vermont had statutes outright prohibiting the employment of women before and after childbirth. Fisch & Schwartz 22. Vermont's law was not repealed until 1969, and Massachusetts' until 1974. Vt. Stat. Ann. tit. 21, § 444 (1947) (repealed 1969); Mass. Gen. Laws ch. 345 (1911) (repealed 1974). To this day, New York has a mandatory maternity leave law on the books. N.Y. Lab. Law § 206-b (McKinney 1973) (forbidding employment of women in factories or mercantile establishments within four weeks of childbearing). In addition to state mandatory maternity leave laws, state agencies had mandatory maternity leave policies for their female employees. *See, e.g., Schattman v. Texas Empl. Comm'n*, 459 F.2d 32, 40-41 (5th Cir. 1972) (upholding mandatory maternity leave policy of Texas state agency and noting that other Texas agencies have similar policies).

This Court has held unconstitutional mandatory maternity leave policies similar to those adopted by the states. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). Not only do such policies limit the workforce participation, including in state employment, of childbearing women, but they also make all women vulnerable to workplace discrimination. Congress recognized that "the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace." S. Rep. No. 331, at 3 (1977).

4. Jury Service for Men Only

Until recently, state laws systematically excluded or exempted women from jury service largely because of an assumption that women had to care for their families. In 1961, less than half of the states considered women for jury selection on the same basis as men. *See Hoyt v. Florida*, 368 U.S. 57, 63 & nn.5-8 (1961) (listing state statutes); *see generally J.E.B.*, 511 U.S. at 131-34 (discussing history of women's exclusion from jury service). Many of these state laws explicitly exempted women but not men who had to care for sick family members. For example, Connecticut's jury service statute excused any woman who was "nursing a sick member of her family, or who has care of one or more children under the age of sixteen years." Conn. Gen. Stat. § 51-218 (1953) (repealed 1975). Similar provisions existed in other states.[28] As late as 1980, 21 states still exempted women but not men for family responsibilities, *see* Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 Stan. L. Rev. 1115, 1138 (1994), despite the fact that this Court held that such laws violate the Sixth Amendment in *Taylor v. Louisiana*, 419 U.S. 522 (1975).

The states' discriminatory jury service laws were based in large part on the belief that women were "the center of home and family life" and therefore had "special responsibilities." *Hoyt*, 368 U.S. at 61-62. Numerous state courts relied on similar stereotypes to uphold such laws. For instance, the Virginia Supreme Court found that the state

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[28] *See, e.g.*, Fla. Stat. ch. 40.01(1) (1967) (amended 1979) (exempting mothers with children under 18); Mass. Gen. Laws ch. 234 § 1 (1949) (amended 1973) (exempting mothers of and women with custody of children under 16); N.C. Gen. Stat. § 9-19 (1951) (repealed 1967) (exempting women who care for children under 12 or ill family members); Tex. Rev. Civ. Stat. Ann. art. 2135 (1964) (repealed 1985) (excluding women with custody of children under 16).

had "a substantial interest in the care of children and persons with mental or physical impairments, and the statutes reflect a reasonable recognition by the legislature that women are usually the persons who perform such service." *Archer v. Mayes*, 194 S.E.2d 707, 710 (Va. 1973). The Louisiana Supreme Court upheld a law "established, obviously, to foster and encourage woman's role as mother and the mainstay of family life." *State v. Washington*, 272 So. 2d 355, 357 (La. 1973).[29]

As this Court acknowledged, stereotypes like those in the jury laws "are likely to stigmatize as well as to perpetuate historical patterns of discrimination." *J.E.B.*, 511 U.S. at 140 n.11. These state laws not only kept women from participating in an area of public life based on the assumption that women should care for their families, they also precluded men from assuming greater family caretaking responsibilities by not excusing them on the same basis. In other words, they perpetuated the notion that women should serve as family caretakers and that men need not.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully urge that this Court affirm the decision below.

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[29] *See also State v. Parker*, 462 S.W.2d 737, 740 (Mo. 1971); *Dekosenko v. Brandt*, 313 N.Y.S.2d 827, 830 (N.Y. Sup. Ct. 1970), *aff'd*, 318 N.Y.S.2d 915 (App. Div. 1971); *State v. Comeaux*, 211 So. 2d 620, 622 (La. 1968); *Scott v. State*, 207 So. 2d 493, 496 (Fla. 1968); *State v. Hall*, 187 So. 2d 861, 868 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966); *cf. Duren v. Missouri*, 439 U.S. 357 (1979).

Respectfully submitted,

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APPENDIX A

AMICI CURIAE

Alice Kessler-Harris is the R. Gordon Hoxie Professor of American History at Columbia University. Professor Kessler-Harris has written extensively on the history of women in the American labor force. Her publications include *Out to Work: A History of Wage-Earning Women in the United States* (Oxford 1982); *A Woman's Wage: Historical Meanings and Social Consequences* (Kentucky 1990); *Women Have Always Worked: A Historical Overview* (Feminist Press 1981); and most recently, *In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in the United States* (Oxford 2002), which won the Bancroft Prize and the Herbert Hoover Presidential Book Award.

Linda K. Kerber is the May Brodbeck Professor of Liberal Arts and Professor of History at the University of Iowa. Professor Kerber is a member of the American Academy of Arts and Sciences as well as the Society of American Historians, and has served as president of the Organization of American Historians (1997) and the American Studies Association (1988). She has written extensively on women's rights and women's roles in American history, and her publications include *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (Hill & Wang 1998), which was the winner of the Littleton Griswold Prize for best book in American legal history and the Joan Kelley Prize for the best book in women's history, both awarded by the American Historical Association.

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Eileen Boris is the Hull Professor of Women's Studies at the University of California–Santa Barbara. Professor Boris is the Director of the Center for Research on Women and Social Justice at the University of California, Santa Barbara and the co-principal investigator of "Women Working for Economic Justice: A Collaborative Project." Among Professor Boris's published works on the history of women in the American workplace are *Home to Work: Motherhood and the Politics of Industrial Homework in the United States*, which won the Philip Taft Prize in Labor History in 1995; "Social Citizenship and Women's Right to Work in Post-War America," in *Women's Rights and Human Rights: International Historical Perspectives* (Patricia Grimshaw, Katie Holmes & Marilyn Lake eds., Palgrave 2001) (co-written with Sonya Michel); and "The Right to Work is the Right to Live! The Rights Discourse of Fair Employment," *Two Cultures of Right: The Quest for Inclusion and Participation in Modern America and Germany* (Manifred Berg & Martin Geyser eds., German Historical Institute & Cambridge Univ. Press 2002).

Ardis Cameron is an associate professor of American and New England Studies at the University of Southern Maine. Professor Cameron is a member of the American Studies Committee on Women, a 2002 recipient of a John Simon Guggenheim Fellowship and a 2001 recipient of a National Endowment for Humanities Senior Research fellowship. Her publications include *Radicals*

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Darlene Clark Hine is the John A. Hannah Professor of History at Michigan State University. Professor Hine is Past-President of the Organization of American Historians and President-Elect of the Southern Historical Association. Her publications include: *Black Women in America: An Historical Encyclopedia* (Oxford Univ. Press 2d ed. 2003) (editor), *Black Women in White: Racial Conflict and Cooperation in the Nursing Profession, 1890-1950* (Indiana Univ. Press 1989), and *Black Victory: The Rise and Fall of the White Primary in Texas* (Univ. of Missouri Press 2d ed. forthcoming 2003).

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Anne Firor Scott is the W.K. Boyd Professor of History Emerita at Duke University. She is the former president of both the Organization of American Historians and the Southern Historical Association. Professor Scott has written extensively on the history of American women, and particularly on the parallel lives of black and white women. Her writings include *Making the Invisible Woman Visible* (Univ. of Illinois Press 1984); *Natural Allies: Women's Associations in American History* (Univ. of Illinois Press 1992); and *Unheard Voices: The First Historians of Southern Women* (Univ. Press of Virginia 1993).

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Michael C. Grossberg is a professor of History and Law at Indiana University–Bloomington. Professor Grossberg has won numerous awards for his teaching and writings in the area of American history. Among his publications are *Governing the Hearth: Law and the Family in Nineteenth Century America* (Univ. of North Carolina Press 1985) and "Giving the Present a Past? Family Law in the United States, 1950-2000," in *Cross Currents: Anglo-American Family Law, 1950-2000* (San-

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Susan M. Reverby is a professor of Women's Studies at Wellesley College. Professor Reverby is a historian of American women and has written and edited extensively on the subject of women's history. In addition to prize-winning books and articles, she co-edited *America's Working Women: A Documentary History* (Random House/Vintage 1st ed. 1976).

APPENDIX B

STATE FAMILY LEAVE LAWS ENACTED PRIOR TO THE PASSAGE OF THE FMLA

STATE	AS OF 1985	AS OF 1990	AS OF 1993	DEFICIENCIES IN SCOPE OF STATE LAW COMPARED TO FMLA
ALABAMA	None	None	None	No family leave statute.
ALASKA	None	None	√	Limited to 18 weeks over two-year period for family illness. Covered state employees only.
ARIZONA	None	√	√	*No family leave statute covering illness.* Covered birth/adoption only.
ARKANSAS	None	None	None	No family leave statute.
CALIFORNIA	None	None	√	Limited to 4 months over two-year period. Employee illness not covered.

COLORADO	None	None	√	*No family leave statute covering illness.* Granted same leave for birth/adoption.
CONNECTICUT	None	√	√	Initially covered state employees only.
DELAWARE	√	√	√	*No family leave statute covering illness.* Limited to 6 weeks only for adoption. Covered state employees only.
FLORIDA	None	None	√	Employee illness not covered. Covered state employees only.
GEORGIA	None	None	√	Covered state employees only.
HAWAII	None	None	√	Limited to 4 weeks a year. Employee illness not covered. Employers with fewer than 100 employees exempt. Covered state employees only.

IDAHO	None	None	None	No family leave statute.
ILLINOIS	None	None	None	No family leave statute.
INDIANA	None	None	None	No family leave statute.
IOWA	None	None	None	No family leave statute.
KANSAS	None	None	None	No family leave statute.
KENTUCKY	√	√	√	*No family leave statute covering illness.* Limited to 6 weeks for adoption of child under 7. Job reinstatement not specified.
LOUISIANA	None	None	None	No family leave statute.
MAINE	None	√	√	As of 1988, limited to 8 weeks over two-year period. As of 1991, limited to 10 weeks over two-year period.

MARYLAND	None	None	√	Discretionary. Employee illness not covered. Covered state employees only.
MASSACHUSETTS	√	√	√	*No family leave statute covering illness.* Provides women only up to 8 weeks leave for the birth/adoption of child under 3.
MICHIGAN	None	None	None	No family leave statute.
MINNESOTA	None	√	√	*No family leave statute covering illness.* Limited to six weeks for birth/adoption.
MISSISSIPPI	None	None	None	No family leave statute.

MISSOURI	None	None	√	*No family leave statute covering illness.* Granted same leave for adoption as for birth. Covered state employees only.
MONTANA	None	None	None	No family leave statute.
NEBRASKA	None	None	None	No family leave statute.
NEVADA	None	None	None	No family leave statute.
NEW HAMPSHIRE	None	None	None	No family leave statute.
NEW JERSEY	None	√	√	Limited to 12 weeks over two-year period. Employee illness not covered.
NEW MEXICO	None	None	None	No family leave statute.

NEW YORK	None	None	√	*No family leave statute covering illness.* Granted same leave for adoption as for birth.
NORTH CAROLINA	None	None	None	No family leave statute.
NORTH DAKOTA	None	√	√	Employee illness not covered. Covered state employees only.
OHIO	None	None	None	No family leave statute.
OKLAHOMA	None	√	√	Family leave for illness restricted to critically or terminally ill child or "dependent adult." Illness of employee not covered. Covered state employees only.

OREGON	None	√	√	As of 1987, covered only birth/ adoption. As of 1992, restricted leave to the illness of a child requiring "home care" or to care for a child, parent or spouse requiring "constant care." Leave for family illness limited to 12 weeks over two-year period. Benefits stopped accruing during family leave.
PENNSYLVANIA	None	√	√	*No family leave statute covering illness.* Limited to 6 weeks for adoption. Covered state employees only.
RHODE ISLAND	None	√	√	As of 1987, limited to 13 weeks over a two-year period for birth, adoption, or care of seriously ill child only. Later expanded to cover illness of spouse, parent or employee.

SOUTH CAROLINA	None	None	None	No family leave statute.
SOUTH DAKOTA	None	None	None	No family leave statute.
TENNESSEE	None	√	√	*No family leave statute covering illness.* Limited to 30 days for adoption. Covered state employees only.
TEXAS	None	None	√	*No family leave statute covering illness.* Limited to 6 weeks for "normal child birth"/adoption. Covered state employees only.
UTAH	None	None	None	No family leave statute.
VERMONT	None	None	√	
VIRGINIA	None	None	None	No family leave statute.

WASHINGTON	None	√	√	Covered only birth, adoption or "terminal illness" of a child. Employers with fewer than 100 employees exempt.
WEST VIRGINIA	None	√	√	Employee illness not covered. Covered state employees only.
WISCONSIN	None	√	√	Limited to 6 weeks for birth/adoption. Limited to 2 weeks for family illness.
WYOMING	None	None	None	No family leave statute.

Sources: Steven K. Wisensale & Michael D. Allison, *An Analysis of 1987 State Family Leave Legislation: Implications for Caregivers of the Elderly*, 28 The Gerontologist 779 (Dec. 1988); Ira B. Sprotzer, *Parental and Family Leave Laws: A Review and Analysis, in* 15-4 Employee Benefits J. 12 (Dec. 1990); *Family Leave Activity Shifts to the States*, Employee Benefit Notes, Vol. 11-10 (Oct. 1990); Michele Lord & Margaret King, *The State Reference Guide to Work-Family Programs for State Employees* 107 (1991); Women's Bureau, U.S. Dep't of Labor, State Maternity/Family Leave Law (1993) (includes pregnancy disability and sick leave) and state statutes referenced therein.

This appendix includes only parental and family leave statutes. It does not include administrative rules, paid sick leave provisions, or maternity disability provisions.